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No.———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Medallion Kitchens, Inc.

Petitioner,

v.

National Labor Relations Board,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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1987—Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411—588-7506

QUESTIONS PRESENTED

1. Is the continued employment of permanent replacement workers the only "legitimate and substantial" business justification for an employer's failure to reinstate economic strikers once the strikers have offered to return to work?

2. May the National Labor Relations Board hold a respondent liable on a substantially changed legal theory without amending its complaint and permitting time for response?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Medallion Kitchens, Inc. and the Respondent National Labor Relations Board. Local No. 1267 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) was an Intervenor in the proceedings in the Court below.

Petitioner Medallion Kitchens, Inc. has no parent companies, subsidiaries or affiliates appropriate for listing pursuant to Rule 28.1.

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The Petitioner Medallion Kitchens, Inc. ("Medallion") respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on November 26, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 806 F.2d 185 (8th Cir. 1986), and is reprinted in the Appendix ("App.) hereto. The Decision and Order of the National Labor Relations

Board is reported at 275 NLRB No. 8, 119 LRRM 1016 (1985), and is reprinted in the Appendix hereto. The National Labor Relations Board's Decision and Order affirmed and modified the December 26, 1984 Decision of Administrative Law Judge Karl H. Buschmann, which is reprinted in the Appendix hereto.

JURISDICTION

Pursuant to 29 U.S.C. § 160(f), the Petitioner appealed an adverse Decision and Order of the National Labor Relations Board in an unfair labor practice case to the United States Court of Appeals for the Eighth Circuit. On November 26, 1986, the Court of Appeals entered its judgment and opinion affirming the Decision and Order of the National Labor Relations Board. No petition for rehearing was brought. The jurisdiction of this Court is invoked under 29 U.S.C. §§ 160(e) and (f) and 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

1. 29 U.S.C. § 158(a)(3) provides in relevant part:

   It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

2. 5 U.S.C. § 554(b) provides in relevant part:

   Persons entitled to notice of an agency hearing shall be timely informed of . . .
   (3) The matters of fact and law asserted.

3. 29 U.S.C. § 160(b) provides in relevant part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board . . . shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof . . . Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. . . .

4. 29 CFR § 102.17 provides:

> Any [unfair labor practice] complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to Section 102.45, upon motion, by the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to Section 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

STATEMENT OF THE CASE

Medallion Kitchens, Inc., a small manufacturer of kitchen and bathroom cabinetry, formerly operated a plant in Fergus Falls, Minnesota. Two hundred and seventy nine of Medallion's Fergus Falls employees were represented by Local 1267 of the United Automobile Workers Union. On September 19, 1983, the parties' collective bargaining agreement expired; the members of Local 1267 voted down Medallion's final wage increase offer and began an economic strike on September 19, 1983. While Local 1267

struck, Medallion continued operating by employing bargaining unit members who never struck, approximately 40 bargaining unit strikers who chose to return to work, and newly hired replacement employees (all of whom are referred to herein as "replacements").

On December 10, 1983, a fire gutted Medallion's main production facility. Immediate steps were taken to promptly resume production. First, approximately thirty replacement employees continued to work full time cleaning up and restoring the production capacity of the facility. Second, in the aftermath of the fire, Medallion attempted to assure the continued availability of its full workforce. Through personal and telephone conversations with replacements during the week following the fire, as well as company-wide employee meetings on December 15 and 17, 1983, the employees who were laid off due to the fire were assured that "they would have jobs" as the company's staffing needs revived.

It was not until December 19, 1983, nine days after the fire damaged Medallion's facility and after Medallion had told the laid-off replacement employees that they would have their jobs back, that Local 1267 made its offer to return to work. Union officers were aware no work was available for more than thirty employees at that time, but this offer allowed ex-strikers to renew their unemployment compensation claims. Honoring the representations it made to replacement employees to assure that its complement of employees did not disappear after the fire, Medallion continued recalling replacement employees as post-fire clean up allowed production work to resume. The replacement workforce grew from thirty on December 10, 1983 to fifty by the end of January, 1984 and to 114 employees by late June of 1984. Once the pool of people working when the fire

struck was exhausted, Medallion recalled ex-strikers, ultimately recalling substantial numbers. Medallion responded to the destruction of its production facility as most employers would: it kept as many people as possible working, laid off the rest, and told those employed at the time of the fire that they would resume working as the company regained momentum. All this took place prior to December 19, 1983, while Local 1267 continued to picket Medallion's plant. Medallion contends that its business-motivated commitments to replacements, made before the bargaining unit strikers who had remained on strike offered to return to work, represent a sufficient nondiscriminatory business justification for recalling replacements prior to reinstating strikers, and that this justification is both "legitimate and substantial" under Section 8(a)(3) of the National Labor Relations Act.

The complaint of the National Labor Relations Board's General Counsel alleged, with respect to Medallion's refusal to reinstate Local 1267's strikers, as follows:

> 5(a) On or about December 19, 1983, the Union made an unconditional offer on behalf of all bargaining unit employees who had been engaged in an economic strike to return to work effective December 26, 1983.
>
> (b) On or about December 26, 1983, Respondent placed the employees described above in subparagraph (a) on layoff status.
>
> 6(a) Since on or about January 4, 1984, and continuing to date, Respondent has recalled striker replacements from layoff status and has failed and refused, and is continuing to fail and refuse, to recall any of the strikers, notwithstanding the fact that strik-

ers have more seniority than the striker replacements who have been recalled.

(b) Respondent engaged in the conduct described above in subparagraph (a) because the employees joined, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Inconsistent with the Board's ultimate theory of unfair labor practice liability, the complaint did not allege a discriminatory refusal to reinstate strikers in relation to the period between December 19, 1983 — when the unconditional offer to return to work was made — and January 4, 1984. During the period of reduced production after the fire until January 4, 1984, at least thirty employees worked at the Medallion facility, performing both maintenance and bargaining unit functions. Had the complaint alleged, as the General Counsel now contends it did, that all Medallion replacements were "temporary" and therefore subject to immediate dismissal upon the Union's offer to return to work, this period of replacement employment would have constituted a violation of Section 8(a)(3) and Medallion would have been required to immediately discharge the thirty replacement employees who continued working. No such claim was ever made, though such an allegation would be axiomatic under the unalleged theory of ultimate liability.

The General Counsel's actual theory, as reflected in its complaint, was that the layoff of permanent replacements in the aftermath of the fire created "vacancies" which trig-

gered Medallion's obligation to reinstate strikers on the basis of their generally superior seniority over the replacements when recalls commenced on January 4, 1984. Consistent with this pleaded theory, employees working after the fire but before the recalls began were not a source of unfair labor practice liability for Medallion: these employees were not laid off. Therefore, these 30 positions did not give rise to "vacancies" to which strikers were entitled to be reinstated on a seniority basis. Since replacement employees were thus presumed entitled to continued employment unless they were laid-off and their seniority was less than that of strikers, their pre-fire status as permanent employees was presumed by the complaint.

The Administrative Law Judge's ("ALJ") ulitmate finding of liability, however, was premised on the ground that Medallion's replacements were temporary. *See,* App. at 36. The General Counsel's complaint was never amended to reflect this change of theory. But, in post-hearing briefs, both the General Counsel and Charging Party argued that the status of replacement employees before the strikers' offer to return to work was the source of Medallion's unfair labor practice liability. Because the pre-fire status of replacements had been foreclosed by the complaint and other pre-hearing communications, and because it was deprived of its right to fully litigate the status of replacements at the unfair labor practice hearing, Medallion filed a motion with the Administrative Law Judge, seeking alternatively to strike portions of the General Counsel's and Charging Party's briefs or to reopen the hearing record to permit Medallion to present evidence on the issue of permanence. This evidence, including testimony as to express offer and acceptance of permanent status by replacement employees

and confirming personnel records, was summarized in an offer of proof. The Administrative Law Judge inexplicably denied this motion in his Decision and went on to find Medallion liable under the unalleged theory rather than the pleaded theory of the complaint. Although Medallion had asserted other legitimate and substantial business justifications for its actions, the ALJ's holding focused only on the justification of permanent replacement:

> . . . [T]he Respondent has failed to meet his burden of justifying its failure to reinstate the strikers, because their jobs were not filled by permanent replacements. App. at 36-37.

The National Labor Relations Board affirmed the ALJ's Decision with certain modifications. With respect to the reinstatement issue, the Board summarily adopted the ALJ's Decision:

> The judge found, and we agree, that the replacement employees hired by the Respondent were not permanent replacements for the employees who went on strike on 19 September 1983 and therefore the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the strikers on their unconditional offer to return to work. App. at 15.

On appeal pursuant to 29 U.S.C. § 160(f), Medallion argued that its legitimate need to assure a post-fire workforce and its explicit commitments to replacements, both of which crystallized before the employer knew of the strikers' offer to return to work, provided a legitimate and substantial business justification sufficient to overcome a Section 8(a)(3) charge of discrimination. Reviewing the record, as had the ALJ and the Board, solely with respect

to the justification of permanent replacement, the Eighth Circuit Court of Appeals affirmed the Board's Decision and Order. Concluding that "the ALJ adequately considered Medallion's intentions in determining the status of replacements" (App. at 9), the Court of Appeals ignored Medallion's contention that the lack of any objective evidence or even any possible inference of its discriminatory motivation for declining to reinstate strikers was the key to resolving the Section 8(a)(3) charge. Analyzing only the permanent replacement justification, the Court of Appeals ignored the fact that replacement workers remained fully employed after the fire and held that substantial evidence on the record sustained the ALJ's conclusion "that Medallion's 'assurances' after the December 10 fire were not assurances of permanent positions . . .". (*Id.*)

The Court of Appeals declined to consider whether any justification other than permanent replacement might validate an employer's failure to reinstate economic strikers, though this Court has explicitly affirmed that such justifications may be sufficient as defenses. Pursuant to 29 U.S.C. §§ 160(e) and (f) and 28 U.S.C. § 1254(1), Medallion now petitions this Court for a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit.

REASONS FOR GRANTING THE WRIT

I.

Permanent Replacement of Strikers Is Not The Only Legitimate And Substantial Justification For A Refusal To Reinstate Under Section 8(a)(3) Of The National Labor Relations Act.

When economic strikers offer to return to work, but the jobs claimed by strikers have been occupied by permanent replacement workers hired by the struck employer in order to continue its operations, a legitimate and substantial business justification for refusing to reinstate the economic strikers exists. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967). In this case, some 20 years after *Fleetwood Trailer Co.*, the Court is asked to clarify that permanent replacement is not the only legitimate and substantial business justification for declining to reinstate ex-strikers. The Court has not squarely addressed the strike replacement issue since *Fleetwood Trailer Co.*

In the current American economy, the frequency of major strikes and the use of strike replacement workers has risen dramatically. Against the backdrop of these changes, the "permanent replacement" rule has lost much of its utility. Once the rule provided a means of discerning the the legitimacy and significance of an employer's business interests in the context of a charge of anti-union discrimination. Now the rule provides, on the one hand, a means for legalized anti-union discrimination by employers who wish to penalize and rid themselves of striking employees and, on the other hand, a senseless rule which imposes unfair labor practice liability without proof of discrimination upon an employer that attempts to save its business in the face of hardship.

Section 8(a)(3) of the National Labor Relations Act (hereinafter "NLRA" or "the Act") prohibits an employer such as Medallion from discriminating in regard to "hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Owing to § 8(a)(3), an employer may not discriminate against striking employees because of their protected strike activity. This Court has held that an employer who refuses to reinstate strikers violates Sections 8(a)(1) and (3) unless it can show that its refusal was justified by legitimate and substantial business considerations. *NLRB v. Fleetwood Trailer Co., supra,* 389 U.S. at 378; citing *NLRB v. Great Dane Trailers,* 388 U.S. 26, 34 (1967). (The § 8(a)(1) violation, as in the instant case, was merely derivative of the § 8(a)(3) violation. Only the dictates of § 8(a)(3) are at issue here.) Nothing in these cases indicates that permanent replacement is the *only* legitimate and substantial business justification for refusing to reinstate economic strikers.

Unfortunately, the Eighth Circuit Court of Appeals adopted such a view in affirming the NLRB's Decision:

> The ALJ examined whether the replacement employees had temporary or permanent status to determine whether Medallion violated the Act by failing to reinstate the economic strikers. App. at 4. . . .
>
> The ALJ . . . found against Medallion on the basis that the replacement employees were not permanent replacements and, therefore, the strikers, upon their unconditional offer to return to work, were entitled to be recalled in lieu of the replacements. App. at 6.

In the court below, Medallion argued that an employer's promise of permanent status to a strike replacement worker is but one way that non-discriminatory business reasons for declining to reinstate strikers could be evidenced. Medallion contended, however, that § 8(a)(3) is satisfied where, as in this case, there are legitimate and incontrovertible business justifications for making commitments to replacements and declining to reinstate strikers which rebut any possible inference of discrimination.

While agreeing that "the employer's manifestations of its intentions" are relevant to the determination of a § 8(a)(3) violation, the Court of Appeals affirmed the NLRB's decision which considered the employer's non-discriminatory intentions only "regarding the permanent or temporary status of the replacements." App. at 9; *see,* App. at 32. Contrary to Medallion's argument that legitimate and substantial business justifications other than permanent replacement may validate a refusal to reinstate strikers, the Court of Appeals considered only "the question of whether the board erred in finding that the replacements were temporary." App. at 8. An examination of the permanence rule's origin and purpose reveals that the Eighth Circuit's limited focus erroneously resulted in a finding of liability under § 8(a)(3) absent any finding or showing of discrimination. This is a situation which can and should be rectified by this Court.

The origin of the permanent replacement rule lies in *NLRB v. Mackay Radio and Telegraph Co.*, 304 U.S. 333 (1937). *Mackay Radio* involved a § 8(a)(3) charge for refusal to reinstate those economic strikers who had been union activists while reinstating those strikers who had not been active in the union. This Court held that such disparate treatment of union activists was a violation of § 8(a)(3).

The employer in *Mackay Radio* was also charged with a § 8(a)(3) violation on the basis that it had promised permanent employment to strike replacement workers. This Court held that such promises did not amount to a § 8(a)(3) violation:

> Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although § 13 provides, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. *NLRB v. Mackay Radio and Telegraph Co., supra,* 304 U.S. at 345-346.

Thus, this Court's *Mackay Radio* decision recognized that the use of permanent replacements was *one* legitimate, nondiscriminatory business measure immune to challenge under § 8(a)(3). In *Fleetwood Trailer Co.*, the Court added that use of permanent replacements was a legitimate and substantial justification for failure to reinstate economic strikers upon their offer to return to work. *NLRB v. Fleetwood Trailer Co., supra,* 389 U.S. at 379, citing *NLRB v. Mackay Radio and Telegraph Co., supra,* 304 U.S. at 345-346. Nothing in *Mackay Radio* or *Fleetwood Trailer Co.*,

however, even remotely suggests that employment of permanent replacements is the *only* legitimate and substantial business justification for failing to reinstate economic strikers. Indeed, although not forced to decide the issue, the Court in *Fleetwood Trailer Co.* acknowledged that justifications other than employment of permanent replacements could be asserted consistent with § 8(a)(3). *NLRB v. Fleetwood Trailer Co., supra,* 389 U.S. at 379-380. This position was restated in Justice Blackmun's concurring opinion in *NLRB v. International Van Lines,* 409 U.S. 48, at 54 (1972). Unfortunately, the NLRB and the courts of appeal have enlarged the permanent replacement rule from one evidentiary determinant of non-discriminatory motives into an exclusive mechanism for defending against unfair labor practice liability in a refusal to reinstate case, even in the absence, as here, of any evidence of the discrimination prohibited by § 8(a)(3).

Medallion had two justifications for refusing to reinstate strikers. First, in the wake of the fire which destroyed its plant, and facing a continuing strike without knowing that the strikers would offer to return to work, Medallion had a significant business interest in assuring adequate staffing for clean-up and the resumption of production, and its contemporaneous commitments to its existing labor force at the time of the destructive fire was plainly without discriminatory motive. Second, honoring the commitments that were made to replacement employees that they would "have their jobs back", after the fire and before the strikers' offers to return to work, was appropriate and likewise could not be viewed as discriminatory in motive. The Board and Court of Appeals erred by considering only whether Medallion had proven the permanent status of its replacement employ-

ees. Medallion argued to the Board and to the Eighth Circuit that permanent replacement is not the only justification sufficient under § 8(a)(3) of the NLRA to validate a failure to reinstate economic strikers. This Court is now called upon to clarify these crucial issues in the law of strike reinstatement under the National Labor Relations Act.

II.

The General Counsel Should Be Required To Amend Its Complaint Before The National Labor Relations Board Holds A Respondent Liable On A Changed Legal Theory.

Unlike a civil litigant, the National Labor Relations Board has broad investigatory powers, nearly unlimited powers to amend its complaint at any time during an unfair labor practice case, and a particular expertise in the subject matter of the complaint. Despite these factors, the Eighth Circuit Court of Appeals approved the General Counsel's failure to meet a minimal standard of notice by pleading all claimed theories of liability in its complaint at some point in the proceeding. This failure was contrary to the clear statutory policies of the National Labor Relations Act and the Administrative Procedure Act.

The Supreme Court has not squarely addressed the NLRB's burden of pleading for 35 years. In 1938, the Court upheld the Board's amendment of a charge after a hearing, but only after finding that "at no time during the hearing was there any misunderstanding as to what was the basis of the Board's complaint." *NLRB v. Mackay Radio and Telegraph Co., supra,* 304 U.S. at 349-50. In 1951, the Supreme Court quoted with approval the Seventh Circuit's holding that:

> All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice so that respondent may be put on his defense. *American Newspaper Publishers Association v. NLRB*, 193 F.2d 782 (7th Cir. 1951) *aff'd.* 345 U.S. 100.

Since these decisions the Board has adopted its own liberal rule governing amendment of an unfair labor practice complaint. 29 CFR § 102.17 provides:

> Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to § 102.45, upon motion, by the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to § 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

This rule freely permits amendment of the complaint at any time before final disposition of the case by the Board and further permits the General Counsel to easily notify the respondent of any change in factual or legal theory through amendment of the pleadings. Amendment of the complaint is thus available even where an issue is raised anew at an unfair labor practice hearing, at least where adequate time for response is available. The Board's own rule is consonant with the mandate of the Administrative Procedure Act, which requires that all matters of fact and law asserted against a charged party be set forth in timely fashion. *See*, 5 U.S.C. § 554(b)(3).

It is central to fair process under both the NLRA and the APA that the General Counsel's complaint "state the unfair labor practice charges". *See*, 29 U.S.C. § 160(b).

Here the General Counsel pled one charge while the ALJ and Board found liability on another. The General Counsel's fair notice obligation under the directives of the NLRA and APA should be held to mandate that, where distinctly different theories of unfair labor practice liability are relied upon, these should be set forth on the face of the complaint. Prior to the Eighth Circuit's decision in this case, it had appeared that this was in fact the law. *See, Boyle's Famous Corned Beef Co. v. NLRB*, 400 F.2d 154, 163 (8th Cir. 1967). Apparently the Eighth Circuit has now departed from the decisions of its companion Courts of Appeals. *See, e.g., Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983); *Presto Casting Co. v. NLRB*, 708 F.2d 495, 498 (9th Cir. 1983), *cert. den.* 104 S.Ct. 489 (1984); *NLRB v. Pepsi-Cola Bottling Co. of Topeka*, 613 F.2d 267, 273 (10th Cir. 1980). This important conflict needs to be rectified by this Court.

The Circuits have also diverged as to the effect of the Board's rule on the General Counsel's duty to plainly state its allegations. The Fifth Circuit has held that, despite the liberal amendment rule, the Board has the right to adjudicate an unpled matter. *See, NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977). Another Circuit has held the Board to its duty of amending the complaint and further provided the respondent with six weeks of preparation time to meet a new allegation. *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 728 (9th Cir. 1980) *cert. den.* 451 U.S. 984, 101 S. Ct. 2317, 68 L. Ed.2d 841 (1981).

In the instant case, the Eighth Circuit Court decided that the General Counsel's complaint gave sufficient notice of the ultimate theory of liability. This decision relieved the

General Counsel of any obligation to amend its pleading, despite a radical change in its theory of liability. It also left Medallion with an onerous backpay and reinstatement liability, to which it had defenses it was unfairly foreclosed from asserting. The Court imposed upon Medallion the obligation to prove an affirmative defense which was mooted by, and therefore irrelevant under, the General Counsel's complaint. The NLRB complaint identified Medallion's discriminatory acts under Section 8(a)(3) of the Act as follows:

> Since on or about January 4, 1984, and continuing to date, Respondent has recalled striker replacements from lay-off status and has failed and refused, and is continuing to fail and refuse, to recall any of the strikers, *notwithstanding the fact that said strikers have more seniority than the striker replacements who have been recalled.*

Medallion Kitchens, Inc. v. NLRB, 806 F.2d 185, — (8th Cir. 1986) (App. at 5) (italics added). The italicized language alleged that Medallion discriminated by failing to reinstate more senior ex-strikers over replacement employees. The element of higher seniority was central to the General Counsel's theory of liability, since the Seventh Circuit Court of Appeals had previously held that layoffs of replacements did not alone entitle strikers to reinstatement. *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1980).

The Board found that Medallion had violated Section 8(a)(3) of the Act, but did so under a "temporary replacement" theory, in which "lay-off status", "vacancies" and "seniority" are entirely irrelevant. This theory cannot be

reconciled with the language of the complaint, which presumes the permanent status of replacements. Had this theory been alleged in the complaint, a violation of § 8(a)(3) should have been charged based on the continuing employment of thirty "temporary" replacements in Medallion's facility after the strikers' unconditionally offer to return to work. This ostensible violation was not alleged in the complaint. Therefore, these thirty replacements held jobs to which strikers were not, under the theory actually pled by the General Counsel, entitled to be reinstated. *See, Bancroft Cap Company (United Hatters Union)*, 245 NLRB 547, 102 LRRM 1461 (1979) (layoffs of strike replacements did not give rise to vacancies entitling strikers to reinstatement absent showing that replacements had no reasonable expectation of recall). At the hearing, Medallion thus proceeded to show that seniority was not an issue because replacement workers had a reasonable expectation of recall to their jobs, rather than attempting to show that replacements were permanent. The only mention of replacements' permanent or temporary status was by way of clarifying that this status was an uncontroverted subsidiary issue. Since the Board failed to amend its pleadings, it was only after receiving the Board's post-hearing brief that Medallion discovered that the Board had switched its theories in midstream, relying upon a factual issue which was conceded as a matter of law in the complaint.

The Eighth Circuit's answer to this was to transform the Board's burden of precise pleading into the respondent's burden of proof. The Court correctly concluded that the permanence of strike replacements is an affirmative defense. but refused to recognize that the specific language of the complaint rendered "permanence" moot and therefore irrelevant under the General Counsel's theory of liability.

The Court erroneously characterized the Board's theory of the complaint:

> The General Counsel's theory was that Medallion recalled the replacements and unlawfully refused to recall any of the strikers.

Medallion v. NLRB, 806 F.2d 185, — — (8th Cir. 1986) (App. at 8). If this had been the General Counsel's theory, Medallion would have been in violation of that theory continuously after December 19, 1983. The complaint, however, only alleged violation of Section 8(a)(3) beginning January 4, 1984, despite replacements' employment between those dates. The General Counsel's theory, indeed, was far more specific then that asserted by the Appeals Court and relied upon seniority considerations as proving Medallion's discrimination in filling the vacancies which the complaint alleged had arisen from the post-fire layoff of replacement employees. *See, Bancroft Cap Company (United Hatters Union)*, 245 NLRB 547, 102 LRRM 1461 (1979). The Eighth Circuit Court did not take issue with Medallion's argument that the complaint could only be read as conceding the issue of replacements' pre-fire status. Instead, the Court merely ignored this argument and imposed on the respondent the burden of proof on an issue which had been pled out of the complaint, relieving the Board of any obligation to amend its pleadings.

The Eighth Circuit Court has thus ordained a guessing game which will permit sloppy pleading and "lying in the weeds" by the Board, force expanded proof at hearings, and cause inefficiencies in the hearing process and genuine injustice to the parties. Under the Eighth Circuit's ruling, respondents would be well advised to ignore the allegations

in a Board complaint, and to offer evidence and argument on every conceivable and inconceivable interpretation of the complaint and the record evidence. This shift of the burden of defining the theory of liability to the respondent seems a far cry indeed from the principles of notice and due process enunciated in this Court's earlier decisions. So readily equipped with the power to conform its pleadings to the evidence at any stage of an unfair labor practice proceeding, the Board should be required to amend its pleadings and allow for a response before proceeding under a theory which is unpleaded or affirmatively inconsistent with its complaint. Medallion requests that this Court review the Eighth Circuit's decision to clarify the General Counsel's continuing duty throughout all stages of an unfair labor practice case to notify charged parties of the factual and legal allegations against them.

CONCLUSION

Is employment of permanent replacement workers the only justification sufficient under Section 8(a)(3) of the Act to validate an employer's refusal to reinstate strikers? The ALJ, the NLRB and the Eighth Circuit have said yes. It has twice been suggested in this Court—in *Fleetwood Trailer Co.* and in *International Van Lines*—that permanent replacement is not the only legitimate and substantial justification for such a refusal. Yet the Court has never been squarely presented with an opportunity to decide a case on these grounds and thereby clarify the critical balance in the American Law of private sector labor strikes: strikers are protected against discrimination while employers are entitled to protect their business. Exclusive reference to the rule of permanent replacement protects neither. This is not

the predicament envisioned by Congress in its enactment of Section 8(a)(3). It is, unfortunately, the predicament which has imposed upon Medallion a massive unfair labor practice liability with no showing or finding of discrimination. The imposition of this liability followed from a hearing and decisional process throughout which the General Counsel failed to discharge its prosecutorial responsibility and affirmatively notify Medallion of the theory of the violation ultimately found. Medallion requests that this Court grant certiorari and hold, consonant with the Act, that such a predicament should not and will not be sanctioned under federal labor law.

Dated: January 16, 1987.

4438H

By /s/ RAYMOND ALFRED HAIK
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APPENDIX

APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 85-1548

Medallion Kitchens, Inc.,

Petitioner,

v.

National Labor Relations Board,

Respondent,

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local No. 1267,

Intervenor.

Petition for Review.

Submitted: April 16, 1986
Filed: November 26, 1986

Before JOHN R. GIBSON, Circuit Judge, SWYGERT,* Senior Circuit Judge, and FAGG, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

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*The HONORABLE LUTHER M. SWYGERT, Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

Medallion Kitchens, Inc. appeals from an order of the National Labor Relations Board holding that it violated section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3) (1982), by failing to reinstate returning strikers in place of temporary replacements and that it violated section 8(a)(1) by making coercive statements to the employees before the strike.[1] Medallion argues that the Board erred as a matter of law in concluding that Medallion's workers were temporary rather than permanent. Medallion further argues that because its replacement workers were permanent, it was justified in recalling them from layoff status rather than recalling the strikers. In a related argument, Medallion asserts that it was not accorded due process in the proceedings because the General Counsel's theory of the case in the complaint misled Medallion into believing that the General Counsel was conceding the permanent status of the replacements when in fact the replacements' temporary status turned out to be the basis upon which the violation was found. Medallion argues finally that the finding concerning threats made before the strike is not supported by substantial evidence. After examining each of these arguments, we affirm the decision and order of the Board.

Background:

Local 1267 of the United Auto Workers represented Medallion's production and maintenance employees for more than ten years. The bargaining unit contained about 279 employees of whom about 250 were at work on an average day. The most recent collective bargaining agree-

[1]The Board also determined that Medallion had violated section 8(a)(1) and (3) by withholding during the strike accrued and random day benefits, and Medallion appealed this decision. However, because Medallion has since paid these amounts with interest, the issue is moot.

ment had an expiration date of September 19, 1983. About ten days before the workers were to vote on whether to strike, foreman Bruce Roeder approached an employee that he supervised, Tony Arechigo, and asked how he thought the vote would go. When Arechigo replied that there would probably be a strike, Roeder said, "you guys go on strike, the union is not coming back." On September 15, the unit employees voted to reject Medallion's latest contract offer and authorized the Union to call a strike when the contract expired. On that day picketing began at the plant and most of the unit employees did not come to work. Medallion continued to operate using non-strikers and replacements. The applicants for employment were told that the workers were on strike and that they would receive the normal starting rate of $3.75 an hour. Medallion's Personnel Director told them that he did not know how long they would be working, "it might be a week, it might be less and it might be more * * * they would work up until the strike was over." ALJ Decision at 4.

On December 10, the plant's main building was destroyed by fire and production ceased. During the next few days Medallion contacted most of the post-strike employees through telephone calls and radio announcements to notify them of a meeting at the plant on December 15 and to tell them that the Christmas party would proceed as scheduled on December 17. At the December 15 meeting, Vice President Rone told the employees that Medallion was doing what it could to reopen as soon as possible. He told them to leave their current phone numbers with the company and to be ready to return to work. At the Christmas party on December 17, President Chalmers made a similar speech

emphasizing that the company intended to get everyone back to work as soon as humanly possible.

On December 19, the Union informed Medallion that the strike would end as of December 25 and that all strikers would be unconditionally available for work the following day. On December 27 almost all of the strikers visited the company and left signed slips requesting reinstatement.

At the beginning of January 1984 Medallion began recalling employees to resume work. By the end of January fifty employees were at work and by late June, at the time of the hearing on the unfair labor practice charges, 114 had returned, but none of the former strikers had been recalled.

The Union then filed the unfair labor practice charges that led to the ultimate entry of the Board's order finding that Medallion had violated section 8(a)(1) and (3) of the Act.

I.

The ALJ examined whether the replacement employees had temporary or permanent status to determine whether Medallion violated the Act by failing to reinstate the economic strikers. A commitment to replacements that their positions are permanent may provide a substantial and legitimate business justification, which is a defense to a charge of unfair labor practices under section 8(a)(3). *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378-79 (1967). Before we address Medallion's argument that substantial evidence does not support the finding that the replacements were temporary, we first address Medallion's assertion that it was denied due process because it was not fairly notified that the permanent status of the replacement employees was at issue.

In its complaint, the Board alleged the following:

5.(a) On or about December 19, 1983, the Union made an unconditional offer on behalf of all bargaining unit employees who had been engaged in an economic strike to return to work effective December 26, 1983.

(b) On or about December 26, 1983, Respondent placed the employees described above in subparagraph (a) on layoff status.

6.(a) Since on or about January 4, 1984, and continuing to date, Respondent has recalled striker replacements from layoff status and has failed and refused, and is continuing to fail and refuse, to recall any of the strikers, notwithstanding the fact that said strikers have more seniority than the striker replacements who have been recalled.

(b) Respondent engaged in the conduct described above in subparagraph (a) because the employees joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

At the hearing there was some testimony regarding the permanency of the replacement workers' positions, and in its post-hearing brief, the General Counsel argued that the evidence did not establish that the replacements were permanent under the prevailing law, and that Medallion was not justified in refusing to reinstate the strikers.

Following the hearing and the filing of post-hearing briefs, Medallion moved to strike portions of the General Counsel's brief or, in the alternative, to reopen the record to permit Medallion to present additional testimony. Medallion asserted that the Board's complaint did not give notice that the permanent status of the replacement employees was in dispute. Medallion argued that, in fact, the sole issue raised by the General Counsel's theory of the case was whether the replacements had seniority over the strikers, an issue that is relevant only if the permanent status of the replacements is conceded. Medallion argued that it had ample documentary evidence and testimony that it did not produce on the permanence issue because it was misled by the allegations of the complaint.

The ALJ denied Medallion's motion and found against Medallion on the basis that the replacement employees were not permanent replacements and, therefore, the strikers, upon their unconditional offer to return to work, were entitled to be recalled in lieu of the replacements. The Board affirmed the ALJ's decision. Medallion now asserts that because the issue of permanence was neither pleaded nor litigated, the Board violated its due process rights by basing its decision and order on those grounds. We reject this argument.

Medallion correctly argues that the Board's complaint must specifically plead the charges upon which it bases its allegation that there has been a violation of the Act, and that in the absence of specific pleading, there must have been the opportunity for Medallion to fully and fairly litigate the charges. *See Boyle's Famous Corned Beef Co. v. NLRB*, 400 F.2d 154, 163 (8th Cir. 1968).

Medallion cites a number of cases in which there were significant differences between the alleged violations and the

violations ultimately found. In those cases, the courts held that due process had not been accorded the respondent in the agency action. *See Boyle's Famous Corned Beef Co.*, 400 F.2d at 160 (complaint alleged only that company dominated and assisted the independent union in violation of section 8(a)(1) and (2), but trial examiner went on to find refusal to bargain with the local union as a violation of section 8(a)(1) and (5)); *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 542-44 (6th Cir. 1984) (complaint alleged charge of "unlawful assistance," but General Counsel raised charge of domination after hearing record was closed); *NLRB v. Complas Industries, Inc.*, 714 F.2d 729, 734 (7th Cir. 1983) (original complaint alleged unlawful firing of one employee; the complaint was not amended until the date of the hearing to include charge of unlawful interrogation of another employee); *Presto Casting Co. v. NLRB*, 708 F.2d 495, 498 (9th Cir.), *cert. denied*, 464 U.S. 994 (1983) (complaint charged unfair labor practices connected with the strike itself; company cannot be found guilty of different violation of failing to reinstate workers).

Medallion argues that such a discrepancy exists here between the complaint's allegations and the ultimate basis for the finding of a violation. It asserts that the Board's complaint alleged a violation solely on the basis of three facts: that replacements were laid off, that vacancies occurred, and that the strikers had more seniority than the replacements. Medallion contends that these facts do not conform to the General Counsel's unpleaded theory that the replacements were temporary; thus, the General Counsel was precluded from arguing the temporary status of the employees absent an amendment to the complaint.

We believe that Medallion mischaracterizes the General

Counsel's argument on the temporary status of the replacements by labeling it a new and inconsistent "theory." The General Counsel's theory was that Medallion recalled replacements and unlawfully refused to recall any of the strikers. This theory did not change during the proceedings. The burden was on Medallion to come forward with its own defense as to why the failure to reinstate did not amount to a violation of the Act. "[U]nless the employer can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of unfair labor practices." *Fleetwood Trailer Co.*, 389 U.S. at 378 (1967). One such justification is that the replacements were given permanent status. *Id.* at 379; *see also NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938). Medallion turns the case on its head by arguing that the issue of permanence was an unpleaded theory of the case; rather, it was an affirmative defense that Medallion, not the General Counsel, was obliged to raise. As the Board stated in its brief, the permanence issue was no more conceded by the General Counsel's silence than was any other possible defense Medallion might raise.

Having determined that Medallion's due process rights were not violated, we turn to the question of whether the Board erred in finding that the replacements were temporary. Medallion argues, first, that the Board erred in holding that the replacement employees were given permanent status only if Medallion made an express offer of permanence to the employees; Medallion contends that a manifestation of "a mutual understanding," "assurances," or "commitments" of permanence is sufficient to provide a justification for retaining the replacements. Second, Medallion argues that substantial evidence in the record as a whole supports

its position that there was such a mutual understanding of permanence.

Certainly, the employer's manifestation of its intentions regarding the permanent or temporary status of the replacements is relevant in determining whether the employer had a legitimate reason for recalling replacements over economic strikers. *See Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 804 (1964). Contrary to Medallion's claim, however, the ALJ's decision demonstrates that he adequately considered whether Medallion displayed such intentions.

In support of its assertion that the ALJ and the Board used an inappropriate express permanence standard to determine the status of the replacements, Medallion quotes from a portion of the ALJ's findings:

> While the record shows that the Respondent has assured most of the employees (replacements) who had attended the Company's Christmas Party on December 17, that it would make an effort to get the Company operating as soon as possible and expected the employees to be back to work, it does not indicate that the employees were ever informed that their employment status had changed to one of permanence.

Medallion's Brief at 21 (quoting ALJ Decision at 5).

This statement by the ALJ does not indicate that he is requiring a formalistic expression of permanence. Earlier in his decision he determined that when the replacements were initially hired, they were expressly informed by Medallion that their employment was temporary — it depended on how long the strike lasted. In the portion of the ALJ's findings quoted by Medallion, the ALJ is simply responding to Medallion's argument that "all [replacements] were ad-

vised by Mr. McGrady that they were permanent employees." ALJ Decision at 5 (quoting Medallion's Brief at 7, 27). The ALJ concluded that, contrary to Medallion's argument, the record shows that Medallion did not advise the replacements of any change in their initial understanding. The ALJ decided that Medallion's "assurances" after the December 10 fire were not assurances of permanent positions but were assurances only that the company had no intention of shutting down and intended to reopen for production as soon as possible. He found that nothing in these assurances altered the status quo; the replacements were still to be employed only for the duration of the strike. We conclude that the ALJ adequately considered Medallion's intentions in determining the status of the replacements.

Next, we turn to the question of whether the evidence is sufficient to support the Board's findings. Since the determination of whether the replacement employees are temporary or permanent is essentially a question of fact, the Board's findings are conclusive "if supported by substantial evidence on the record considered as a whole." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951); *NLRB v. Vincent Brass & Aluminum Co.,* 731 F.2d 564 (8th Cir. 1984).

An employer who refuses to reinstate strikers violates section 8(a)(1) and (3) of the Act unless he shows that his action was based on legitimate and substantial business justifications; the burden of proof is on the employer. *See N.L.R.B. v. Great Dane Trailers,* 388 U.S. 26, 34; *see also N.L.R.B. v. Fleetwood Trailer Co.,* 389 U.S. at 378. At the hearing Medallion's Personnel Director testified that the replacement workers were hired with the understanding that their employment would last only until the strike was over:

Q. When you first began interviewing replacement employees, did you interview most of those people?

A. Yes sir.

* * *

Q. Did you tell Mr. Beckman [replacement employee] how long he would be working?

A. No, sir. At that time we didn't know. I told him it might be a week, it might be less and it might be more.

Q. Is that essentially what you told everybody who got hired?

A. Yes, Sir.

Q. That it might be a week, it might be less, it might be a little more?

A. They would work up until the strike was over.

Q. Until the strike was over?

A. Or the people came back.

Transcript at 69-70.

This evidence was essentially uncontroverted. Medallion attempted to counter this testimony by introducing evidence of later statements made to replacements. The ALJ determined, however, that these statements were not sufficient to support Medallion's contentions and, therefore, Medallion did not carry its burden of proof. Since Medallion points to no other evidence in the record that supports its position and was ignored by the Board, we conclude that the Board's findings were supported by substantial evidence in the record as a whole.

II.

Medallion argues that the Board erred in its determination that Medallion violated section 8(a)(1) of the Act by threatening its employees for their concerted, protected activities, and asserts that, as a matter of law, the statements made to several employees by Mr. Roeder before the strike that "you guys go on strike, the Union is not coming back," were not coercive. Viewing the evidence in the record as a whole, we find Medallion's argument to be without merit.

Section 7 of the Act guarantees employees "the right to self-organization to form or assist labor organizations" and "to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining." 29 U.S.C. § 157. Section 8(a)(1) ensures that section 7 rights are protected by making it an unfair labor practice for an employer to interfere with, restrain or coerce employees' exercising these rights. The test for a violation of section 8(a)(1) "is not whether an attempt at coercion has succeeded or failed but whether 'the employer engaged in conduct which reasonably tends to interfere with, restrain or coerce employees in the free exercise of their rights under Section 7.' " *NLRB v. Intertherm, Inc.*, 596 F.2d 267, 271 (8th Cir. 1979) (quoting *Russell Stover Candies, Inc. v. NLRB*, 551 F.2d 204, 208 (8th Cir. 1977)). We must examine not only the statements, but also the surrounding circumstances to determine the coercive nature of the threats. *Id.* at 275. The issue of whether such statements are threats is generally one of fact for the Board's initial consideration. *Id.*

After examining the testimony in the record, the Board made the following conclusions:

> Only some of the above statements made by Respondent's supervisors to the employees were sufficiently coercive and threatening so as to interfere with their Section 7 rights. Roeder's remarks telling the employees that the Union would not come back if the employees went out on strike, was made to several employees, about one week before the strike vote by the Union, at the Company's premises and in an environment of coercion during which the employees were initially interrogated as to whether they favored a strike or not. These statements were clearly intended to dissuade the employees from their support for the Union and the strike. This conduct violated Section 8(a)(1) of the Act. His other remarks to the effect that he could give the employees pay raises if it were not for the Union was vague and further qualified with the condition that the employee perform well. Under these circumstances, Respondent did not condition a promise of benefits in exchange for the employee's refusal to support the Union. Moreover, the statements made by supervisors Cappola and Rone were not sufficiently clear and, in any case, were not made with the intent to coerce or restrain the individuals. I find therefore that Respondent violated Section 8(a)(1) of the Act only in connection with Roeder's repeated threats to the employees as detailed above.

ALJ Decision at 9.

Keeping in mind that it is the function of the Board, not the court, to pass upon the credibility of witnesses and the weight to be given to their testimony, *R. J. Lallier Trucking v. NLRB*, 558 F.2d 1322, 1325 (8th Cir. 1977), we con-

clude that the inferences drawn by the Board as to the threatening nature of Roeder's statements are warranted by substantial evidence in the record.

The order of the Board is affirmed.

A true copy.
Attest:
CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

MEDALLION KITCHENS, INC.
and
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL NO. 1267
Cases 18—CA—8458, 18—CA—8535, 18—CA—8630

DECISION AND ORDER

On 26 December 1984 Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief; and the General Counsel and the Charging Party filed cross-exceptions and supporting briefs; the Charging Party filed a brief in opposition to the Respondent's exceptions; and the Respondent filed a brief in opposition to the General Counsel's and the Charging Party's cross-exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified.[1]

The judge found, and we agree, that the replacement employees hired by the Respondent were not permanent replacements for the employees who went on strike on 19 September 1983 and therefore the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the strikers on their unconditional offer to return to work.[2] We also agree with the judge's finding that the Respondent violated Section 8(a)(1) by threatening employees prior to the strike that, if they went on strike, the Union would not be coming back. The judge further found that the Respondent violated Section 8(a)(3) and (1) by refusing to pay employees their accrued vacation and "random day" benefits because of their participation in the strike. We agree with that finding, but we do so only for the following reasons.

The facts, insofar as they relate to this one issue, are as follows. The most recent collective-bargaining agreement

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[1]We find merit in the General Counsel's cross-exceptions to certain of the affirmative provisions of the judge's recommended Order and therefore modify the Order to provide the traditional reinstatement language used by the Board, and to require the Respondent to pay the discriminatees their accrued vacation and random day benefits with interest. Additionally, because it appears that the Respondent has since closed its Fergus Falls, Minnesota facility and moved its production operations to Waconia, Minnesota, we shall order the Respondent to mail a copy of the notice to each of the bargaining unit employees, including those on the Respondent's payroll immediately prior to 19 September 1983, the date the strike commenced.

[2]In view of our agreement with the judge's finding that the replacements were temporary replacements, we find it unnecessary to pass on the parties' exceptions and cross-exceptions requesting the Board to make findings and conclusions on the issues arising from the alternative contention that the replacements were permanent replacements.

between the Respondent and the Union expired on 19 September 1983. On that date, negotiations for a new collective-bargaining agreement having been unsuccessful, virtually all of the Respondent's approximately 250 employees commenced an economic strike. Within days of the strike, the Respondent began to hire replacements and about 42 strikers returned to work. In November 1983, over 100 of the strikers submitted individual written requests for vacation and random day pay which they had accrued prior to the strike. On 1 December 1983, the Respondent responded as follows in a letter sent to each of the strikers who had made such requests:

SUBJECT: Request for Accrued Vacation and Random Days

> Recently you inquired about the status of the vacation and random days which you may have coming under the old labor agreement.
>
> Medallion Kitchens will fully respect any vacation and random day benefits which you may have accrued pursuant to the previous labor agreement terminated by UAW, Local 1267, at the time of its strike on September 19, 1983. These benefits are not available, however, to employees who are not on active employment status at the time of any requests for vacation or random days, or unless those employees have actually terminated their employment with Medallion Kitchens. No such benefits can be provided under the contract for a strike period and none will be available to any employee who is not either at work or formally separated from employment. You should also be aware that serious misconduct during a strike may termi-

nate any obligation of Medallion Kitchens to provide such benefits.

Medallion Kitchens will honor its vacation and random day obligations under the expired labor agreement to any employee including employees currently on strike, who meets the previous contractual and customary requirements for vacation or random day benefits without discrimination between striking and nonstriking employees and Medallion Kitchens will continue to honor these commitments in the future for eligible employees without such discrimination.

On 19 December the Union notified the Respondent that it was calling off the strike as of 25 December and that its members would make unconditional offers to return to work on 26 December. As indicated in the judge's decision, as of the unfair labor practice hearing none of the strikers had been recalled to work, nor had any strikers received pay for vacation and random days accrued prior to 19 September 1983. Moreover, notwithstanding the statement in the Respondent's 1 December letter that accrued benefits were available for employees who actually terminated their employment, striker employee Nola Halverson, who had submitted a letter of resignation on 11 June 1984, was advised:

Pursuant to the terms and conditions of the Collective Bargaining Agreement between the U.A.W. Local 1267 and Medallion Kitchens, Inc., which was terminated by the Union on September 19, 1983, eligible employees were entitled to vacation/random days.

Because the payment of monies to those employees who might be eligible for such payment is the subject

> of an Unfair Labor Practice charge, filed by the U.A.W. Local 1267, it therefore would be inappropriate to pay you any of the monies that might be owed you for vacation/random days until this Unfair Labor Practice charge is resolved by the National Labor Relations Board. Medallion Kitchens, Inc. will contact you, and forward any monies you might be entitled to as soon as the Unfair Labor Practice charge is resolved.

The Respondent's personnel manager McGrady explained at the hearing that, because of production needs, a decision was made shortly after the strike began to place a "moratorium" on the use of vacation time and random days accrued prior to 19 September so that no one was allowed to take such accrued time off. Three of four nonstrikers were paid for time accrued prior to the strike, but the Respondent contended, and the judge found, that these instances were erroneous and inadvertent. McGrady further testified that employees who quit were paid for their prestrike accrued time until about April 1984.[3]

Under the expired contract, vacation time essentially accrued in increasing amounts depending on the number of completed years of employment. Sections 51 and 52 of the contract also provided:

> 51. No employee shall be allowed to work during their earned vacation and receive pay in lieu of vacation . . . .
>
> 52. Employees who lose seniority prior to their vacation eligibility date will receive one-twelfth (1/12)

[3]This practice was changed apparently in response to the pending unfair labor practice charges. See the Respondent's 19 June 1984 letter quoted above.

> of their vacation for each month they have worked at least forty (40) hours in the month.

The contract also provided for random days to accrue based on completed years of employment and to be used as follows:

> Employees who desire a "random day" *must* notify the Employer by completing a Random Day Request Form with the Company personnel office *no later* than *noon* of the working day immediately preceding the working day requested as a "random day" off. In special circumstances where the production requirements of the Company may be disrupted by excessive Random Day absences, the Company may request that employees voluntarily select alternate "random days . . . ." [Emphasis in original.]

Additional limitations on vacation and random days were embodied in a separate document, which provided, inter alia, that only 10 percent per department could be off work unless more were authorized by the supervisor; that a week's notice was mandatory for vacations; and that random days had to be used one at a time unless approved by the supervisor.

The judge, noting that the Respondent had admitted its financial liability to employees for accumulated prestrike benefits, found that the Respondent's refusal to pay such accrued benefits to employees unless they terminated their employment or were actively employed — while denying employment to the strikers — effectively denied benefits because of the strike. The judge thus found, notwithstanding the Respondent's contention that its policy was not meant

to be discriminatory, that the policy was in fact discriminatory in its effect. Citing *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), the judge concluded that the Respondent's refusal to pay accrued vacation and random day benefits to the strikers violated Section 8(a)(3) and (1).

In agreeing with the judge's conclusion that the Respondent's conduct violated Section 8(a)(3) and (1), we wish to emphasize that this conduct consisted of actual discrimination against employees because of the strike; thus, there is ample direct proof of unlawful motive. In this regard, we particularly note Personnel Manager McGrady's testimony that he was unaware of any situation before the strike where employees who were off work were denied their requests for accrued vacation pay. McGrady further testified that, although the situation had not previously arisen involving employees on leave of absence, employees who were hospitalized were granted their requests for accrued vacation pay. Moreover, Union President Eldon Halverson testified that it was standard practice for employees on permanent layoff[4] to receive accrued vacation and random day pay. Thus, uncontradicted testimony indicates that the Respondent's practice prior to the strike for employees who were not "actively employed" was to pay accrued benefits on request.

It further is undisputed that, following the strike, the Respondent's practice of paying accrued benefits to employees who were not actively employed changed to a policy of not paying any vacation or random day benefits for time accrued prior to the strike. As stated in the Respondent's 1 December

[4]According to Halverson, layoffs of more than 4 10-hour days were considered to be permanent layoffs. Our reading of the layoff provisions of the contract confirms that temporary layoffs were those "not to exceed four (4) working days."

1983 response to strikers' requests for accrued vacation and random days, the Respondent's position was that "[n]o such benefits . . . will be available to any employee who is not either at work or formally separated from employment." In this regard we further note that the Respondent withheld payment for such accrued benefits from all employees actively working during the strike, albeit with a few apparently inadvertent exceptions, and that the Respondent thereafter refused to pay such accrued benefits even to strikers who formally terminated their employment.

Although McGrady testified that the "moratorium" placed on the use of accrued vacation and random days was motivated by production needs, it is clear that the strikers' requests for such accrued benefits would not affect the Respondent's production because they involved the mere payment of money rather than any changes or disruptions in the Respondent's production plans. Similarly, while the Respondent has claimed that its denial of accrued benefits was based on the strikers' failure to satisfy the preconditions in the contract, we also reject that argument, for it was the Respondent's wholesale change in policy, not the preconditions in the contract, which caused the denial of the accrued benefits.

Based on the foregoing, we find that the Respondent's change in policy and practice was motivated entirely by the employees' protected activity of engaging in an economic strike. Thus, applying the Board's standard *Wright Line*[5] analysis for allegations of unlawful discrimination, we find that the General Counsel has shown that the Respondent's conduct was motivated by the employees' protected activities and that the Respondent has not shown that it would have taken the same actions even in the absence of the protected

[5]251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

strike activity.[6] Accordingly, we conclude, in agreement with the judge, that the Respondent's withholding of and refusal to pay accrued vacation and random day pay to the strikers because of their participation in the strike violated Section 8(a)(3) and (1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Medallion Kitchens, Inc., Fergus Falls and Waconia, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to reinstate its employees in accordance with their seniority or otherwise discriminating against them after they had made an unconditional offer to return to work following a strike.

(b) Failing to pay its employees their accrued vacation and random day benefits because of their participation in a strike.

(c) Threatening its employees because of their protected concerted activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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[6]We therefore find it unnecessary to decide whether, under *Great Dane*, the Respondent's conduct was so "inherently destructive" of employee interests that no proof of antiunion motivation is needed. 388 U.S. at 33.

(a) Offer its employees who participated in the strike immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits resulting from the discrimination against them, discharging if necessary the temporary replacement employees, in the manner set forth in the remedy section of the judge's decision.

(b) Pay its employees their accrued vacation and random day benefits irrespective of whether they had participated in a strike, with interest.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail a copy of the attached notice marked "Appendix" to each of the bargaining unit employees, including those who were on its payroll immediately prior to 19 September 1983, the date the strike began. Such notice shall be mailed to the last known address of each employee.[7] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondents' authorized representative, shall be mailed immediately upon receipt, as directed above.

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[7]If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 10 April 1985

Donald L. Dotson, Chairman
Robert P. Hunter, Member
Patricia Diaz Dennis, Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.
Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to reinstate employees who had been on strike or otherwise discriminate against any of our employees because of their support of United Automobile Workers, Local No. 1267, or any other union.

WE WILL NOT refuse to pay vacation or random day benefits to our employees because they participated in a strike.

WE WILL NOT threaten our employees because of their exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer our employees who participated in the strike full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits, with interest, discharging if necessary the temporary replacement employees.

WE WILL pay our employees for their accrued vacation and random day benefits irrespective of whether they had participated in the strike, with interest.

MEDALLION KITCHENS, INC.
(Employer)

Dated ——— By———————————

(Representative)
(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning

this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 316, 110 South Fourth Street, Minneapolis, Minnesota 55401, Telephone 612-349-5393.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MEDALLION KITCHENS, INC.
and
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL 1267
Case Nos. 18-CA-8630, 18-CA-8458, 18-CA-8535

Robert V. Johnson, Esq., of Minneapolis, MN, for the General Counsel.
Douglas P. Seaton, Esq., of Minneapolis, MN, for the Employer.
William F. Garber, Esq., of Minneapolis, MN, on behalf of the Union.

DECISION
Statement of the Case

KARL H. BUSCHMANN, Administrative Law Judge: This case was heard on June 27 and 28, 1984 at Fergus Falls, Minnesota upon a consolidated complaint which alleged that Respondent, Medallion Kitchens, Inc., engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act

("The Act"). More specifically, the complaint alleged (1) that the Respondent threatened its employees and promised them pay raises in order to discourage their participation in a strike, (2) that the Respondent withheld vacation and random day benefits to its employees because they participated in a strike, and (3) that the Respondent failed to recall former strikers who had made unconditional offers to return to work. Respondent's answer, admitting the jurisdictional aspects of the complaint, denied that the company had committed any unfair labor practices.

Upon the entire record,[1] the briefs filed by the parties and upon consideration of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Respondent, Medallion Kitchens, Inc., is a Minnesota corporation located in Fergus Falls, Minnesota where it is engaged in the manufacture and non-retail sale and distribution of kitchen and the bathroom cabinets. It is

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[1]Following the hearing and after the briefs were filed in this case, Respondent by letter, dated September 13, 1984 filed a Motion and a Memorandum in support of that motion to Strike Portions of the General Counsel's Brief and the Charging Party's Memorandum or, in the Alternative for the Reopening of the Record for the Receipt of Additional Testimony. The Respondent argued that the General Counsel relied for part of its case upon a theory not alleged in the complaint and that it had no notice that the General Counsel would dispute the permanent status of its employees who were hired to replace its striking employees. The General Counsel and the Charging Party filed oppositions to Respondent's motion. Their response disputed Respondent's claim that the complaint misled the Respondent or that the issue relating to the permanent status of the replacement employees was not at issue. Since the Respondent did not raise this issue until after the briefs were filed, and since this is not solely a procedural but a substantive issue, I have decided to deal with it in the context of my decision of the entire case. For the reasons discussed *infra*, I hereby deny Respondent's motion.

Respondent's motion to dismiss the case because it had agreed to a settlement of a portion of the case in pretrial negotiations with the General Counsel is hereby denied.

admittedly an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. Its employees totalling 279 were represented by the United Auto Workers, Local 1267. The bargaining relationship between the Union and the Company had existed for more than 10 years.

On September 19, 1983 the most recent bargaining agreement had expired. The parties were unable to reach a new agreement in spite of several bargaining sessions which began on June 6, 1983. The employees decided to strike the facility on September 19, 1983. Prior to the strike, the Respondent through its supervisors had made certain statements to the employees to dissuade them from the strike.

Within a few days of the strike, Respondent began to hire replacement employees for the striking employees and by December 10, 1983, 253 replacement workers, as well as a few non-strikers were working for the Respondent. After the strike, Respondent refused to pay to the strikers any of their accumulated vacation and random day benefits.

On December 10, 1983 a fire destroyed Respondent's premises to such an extent that production ceased and only about 20 or 30 people remained employed and the bulk of the work force was laid off.

On December 19, 1983, the Union made an unconditional offer on behalf of its members to return to work on December 27, 1983. By letter, dated December 19, 1983, the Union informed the Respondent's agent as follows (G.C. Exh. 10): "Because of the very unfortunate circumstances of the fire at Medallion Kitchens at this time I am calling off the strike as of December 25, 1983 at 11:59 p.m. Our members will be unconditionally reporting for work as of December 26, 1983." On December 27 all strikers individually made their unconditional offers to return to work.

Not until late January or early February did the Respondent recall any of its production work force. However none of the strikers were recalled even though they had made their offers to return to work.

Against this brief background, the case presents three issues. First, whether Respondent's failure to recall the strikers violated Section 8(a)(3) and (1) of the Act; second, whether Respondent violated Section 8(a)(3) and (1) of the Act when it failed to pay accrued vacation and random days pay to the strikers; and, three, whether Respondent violated Section 8(a)(1) of the Act by threatening its employees or promising them benefits in order to discourage their strike activity.

Respondent's Failure to Recall the Strikers

There is no dispute that Respondent has not recalled any of the strikers after their unconditional offer to return to work, and that following the fire the Respondent has only recalled the strike replacement employees and a few non-striking employees. The Respondent began recalling these employees in late January or early February and continued to recall the replacement employees until June so that as of June 23, 1983, about 114 replacement employees had been recalled.

The General Counsel's and the Charging Party's position is that after the strikers' unconditional offer to return to work, the Respondent had a duty to recall the strikers, because the replacement employees were not permanent replacements and, even if the replacements had been permanent when they were first hired, the strikers and the replacements should have been recalled in order of their seniority after the layoff period caused by the fire.

Respondent, on the other hand, argues in its brief that

the replacement employees were permanent replacements and that its decision to rehire replacements to the exclusion of the strikers who had made unconditional offers to return to work was entirely within Respondent's right, because the replacement employees had retained their status as permanent employees.

In this regard, the gravamen of the complaint, alleging a violation of Section 8(a)(3) and (1) of the Act, is contained in paragraph 6(a) as follows:

> Since on or about January 4, 1984, and continuing to date Respondent has recalled strikers replacements from layoff status and has failed and refused, and is continuing to fail and refuse, to recall any of he strikers, notwithstanding the fact that said strikers have more seniority then the strikers replacements who have been recalled."

In response to this allegation, Respondent attempted to show that the facts as alleged did not occur and that the replacement employees were permanent employees who had not lost their permanent employment status as a result of the interruption caused by the fire. Respondent's counsel had perceived the legal issue and his burden of proof when he stated in his opening statement, *inter-alia,* as follows (Tr. 16): "With respect to Case No. 18-CA-8630 . . . I think the General Counsel and I would agree that the Employer is entitled under the *McKay* case to hire permanent replacements if an economic strike is underway, and to use them to conduct . . . its business, and . . . unless there is some substantial change in the circumstances . . . that those persons are entitled to continue their employment with the employer . . . and not to be replaced if they are

permanent replacements by ex-strikers even if those strikers make an unconditional offer to return to work."

The record evidence is fairly consistent and supports the factual aspects of the allegation in the complaint. It shows that the Respondent hired replacement employees for the striking employees within several days of the strike which began on September 19, and that a fire occurred on December 10 which resulted in the idling of almost all of the 253 employees except for about 20 to 30 employees. On December 19, shortly after the outbreak of the fire, the Union notified the Company of the strikers' unconditional offer to return to work on December 27, and the strikers individually made their unconditional offer to return to work. Yet the Respondent, when it commenced the recalling of the work force in late January or early February, failed and refused to recall any of the strikers.

Moreover, the record further shows that when the Respondent hired the replacement employees shortly after the strike, they were told that the employment would only last until the strike was over. General Counsel's first witness, Richard McGrady, the personnel director of Medallion Kitchens, testified without objection by Respondent's counsel as follows (Fr. 69-70):

Q. When you first began interviewing replacement employees, did you interview most of those people?

A. Yes sir.

Q. Do you recall hiring Marty Beckman?

A. I remember Marty Beckman. I believe he was hired at the Holiday Inn, but I'm not sure.

* * *

Q. Did you tell Mr. Beckman how long he would be working?
A. No, sir. At that time we didn't know. I told him it might be a week, it might be less and it might be more.
Q. Is that essentially what you told everybody who got hired?
A. Yes, Sir.
Q. That it might be a week, it might be less, it might be a little more?
A. They could work up until the strike was over.
Q. Until the striker was over?
A. Or the people come back.

According to the General Counsel and the Charging Party, the evidence clearly shows that Respondent's replacement employees were not hired as permanent replacements but only as temporary employees and that they could not have been permanent replacements when they were rehired after the strikers had made their unconditional offer to return to work. Respondent however, argues in its brief that the replacements had permanent status. Citing record evidence, Respondent states, *inter alia,* as follows (Resp. brief. p. 7 and 27):

> Within a few days of the strike, Mr. Richard McGrady, Medallion's Personnel Director, began to interview replacement employees and striking employees began to return to work (T. 69-70, 445). By December 9, 1983, a total of 253 permanent replacement and non-striking employees were working (T. 53, GCE 6). Consistent with the Employer's final offer to the Union on September 14, 1983, these employees became per-

manent employees as their 60-day probationary period expired (GCE 2, par. 9, p. 2). Ultimately, all were advised by Mr. McGrady that they were permanent employees and this status was reaffirmed several time in the aftermath of the December 10, 1983 fire (T. 425-428, 458-460).

A careful analysis of the record concerning the issue of whether the employees had permanent or temporary status does not support Respondent's argument. While the record shows that the Respondent had assured most of the employees (replacements) who had attended the Company's Christmas party on December 17, that it would make an effort to get the Company operating as soon as possible and expected the employees to be back to work, it does not indicate that the employees were ever informed that their employment status had changed to one of permanence. Moreover, at that time Respondent had no knowledge of the striker's offer to return to work. Respondent's reliance upon its offer to the Union of a collective bargaining agreement is obviously misplaced, and in any case, it does not support Respondent's position. According to that document, the probationary period for new employees would last 16 weeks and the employees must be members of the Union (Resp. Exh. 3, G.C. Exh. 2).

On September 13, 1984, Respondent moved to strike the General Counsel's and the Charging Party's briefs to the extent that they relied upon the record evidence showing that the replacement employees had been hired on a temporary basis. Respondent's argument is essentially that it was misled into assuming that the status of the replacement employees was not in issue. Respondent moved, in the

alternative, that the case be reopened for additional evidence on that issue but qualified this request by stating that "this would not be the appropriate ruling on the part of the Administrative Law Judge, since the General Counsel and the Charging Party had ample opportunity to construct a theory of this case and to plead or amend the pleadings appropriately." In their oppositions to Respondent's motion, the General Counsel and the Charging Party submit that neither the complaint nor the record could have misled the Respondent, particularly since it is the Company's burden to show that replacement employees were permanent employees.

My analysis of the issue has convinced me that Respondent's motion must be denied, and that I can neither ignore the evidence on this issue nor reopen the proceeding for additional evidence for several reasons. First in his opening statement in this case, Respondent's counsel demonstrated his knowledge of the applicable law and properly perceived the relevant issues raised by the complaint, including the permanent status of the replacement employees. He could not have been surprised or misled because he stated, *inter alia*, as follows (Tr. 16): [T]he Employer is entitled under the *Mackay* case to hire *permanent* replacements if an economic strike is underway, and to use them to conduct . . . its business, and . . . unless there is some substantial change in circumstances . . . that those persons are entitled to continue their employment with the employer . . . and not to be replaced if they are *permanent* replacements by ex-strikers even if those strikers make an unconditional offer to return to work" (emphasis supplied). Second, it was Respondent's personnel manager, who testified as the first witness that the replacement employees were hired on a

temporary basis until the strike was over (Tr. 70). At that time, Respondent's counsel did not object to the testimony. He had the opportunity at that time to examine the witness on this issue and to litigate the matter more fully. Third, asserting that the General Counsel is precluded from raising the issue, the Respondent nevertheless raised the issue and argues repeatedly that the replacements were permanent employees, for in his brief he states, *inter alia*, (Resp. brief p. 7, see also p. 27): "By December 9, 1983, a total of 253 *permanent* replacement and nonstriking employees were working . . . these employees became *permanent* employees as their 60-day probationary period expired . . . all were advised by Mr. McGrady that they were *permanent* employees . . ." (emphasis supplied). Respondent cannot be heard to complain and claim surprise or lack of notice when the General Counsel discusses the same issue but argues the opposite view. Respondent's further reference to non-record evidence, such as communications between counsel during the investigative stage of the proceeding is obviously of no relevance here. Fourth, while it is clear from the foregoing that Respondent was in fact aware of the importance of the issue, although it may have inadvertently ignored McGrady's testimony in this regard. the law is clear that the burden to show the permanent status of the replacement employees is upon the Respondent. In short, once the General Counsel has shown that the Respondent has discriminated against the strikers *i.e.* its failure to reinstate the strikers after their unconditional offer to return. Respondent may defend its action by showing that the strikers have in fact been replaced by permanent replacements. *Zapex Corp. v. NLRB*. 621 F.2d 328 (9th Cir. 1980): *N.L.R.B. v. Murray Products, Inc.*, 584 F.2d 934 (9th Cir. 1978). It

is difficult to see how the Respondent can hope to justify a lack of vacancies at its plant following a massive layoff caused by the fire, without a serious analysis of the permanent status of its replacement employees. Respondent has obviously attempted to do so, but has failed in this regard. Finally, it is clear that this evidence, which is certainly relevant, was not improperly received in this case, it did not raise a new issue, it did not give rise to a new issue of newly discovered evidence, and it certainly was not a surprise to the Respondent. On the basis of the foregoing, as well as additional reasons advanced by the General Counsel and the Charging Party, Respondent's motion must be denied.

In agreement with the General Counsel and the Charging Party, I find that the replacement employees were not permanent replacements and that the strikers upon their unconditional offer to return to work were entitled to be recalled in lieu of the replacements. In *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, the Court made it clear that an employer who refuses to reinstate strikers violates Section 8(a)(3) and (1) of the Act, and stated: "Accordingly, unless the employer who refuses to reinstate strikers can show that this action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice. *NLRB v. Great Dane Trailers,* 388 U.S. 26, 34 (1967). The burden of proving justifications is on the employer." The Court recognized as a justification "when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations. See also, *NLRB v. Mackay Radio and Telegraph Co.*, 304 U.S. 333 (1930).

It is clear in the matter before me, that the Respondent

has failed to meet his burden of justifying its failure to reinstate the strikers, because their jobs were not filled by permanent replacements. I therefore, find that Respondent violated Section 8(a)(3) and (1) of the Act.

Respondent's Failure to Pay Random Day and Vacation Benefit to Strikers

As a violation of Section 8(a)(3) and (1) of the Act, the complaint, alleges that "Respondent has withheld and refused to pay accrued vacation pay and random day pay to its employees."

The record evidence is not in dispute that the Company has indeed withheld the employees' vacation and random day pay. The issue is whether the Respondent did so on a discriminatory basis directed against the strikers. Respondent admitted that its employees had earned certain vacation and random days in accordance with the expired bargaining agreement (G. C. Exh. 2, pp. 7-8). Indeed, Respondent admitted its financial liability to each individual employee for the accumulated vacation and random day benefits as of September 16, 1983 (G.C. Exh. 4).

However, Respondent's position with respect to its obligations is reflected in a letter to one of the employees (G.C. Exh. 11):

> Medallion Kitchens will fully respect any vacation and random day benefits which you may have accrued pursuant to the previous labor agreement terminated by UAW, Local 1267, at the time of its strike on September 19, 1983. These benefits are not available, however, to employees who are not on active employment status at the time of any requests for vacation or ran-

> dom days, or unless those employees have actually terminated their employment with Medallion Kitchens. No such benefits can be provided under the contract for a strike period and none will be available to any employee who is not either at work or formally separated from employment. You should also be aware that serious misconduct during a strike may terminate any obligation of Medallion Kitchens to provide such benefits.

Although assuring the employees that it will honor these commitments, Respondent has simply refused to make payments unless an employee has been "on active employment status" or has terminated his employment. This excludes of course all former strikers who have been denied employment status by the Respondent. Their only recourse to obtain these benefits would be to terminate their employment status and thereby forsake any hope of reinstatement. But even when a former striker who terminated his employment status made a request for payment of the benefits, Respondent has taken the position as follows (G.C. Exh. 9):

> Because the payment of monies to those employees who might be eligible for such payments is the subject of an Unfair Labor Practice charge, filed by the U.A.W. Local 1267. It therefore would be inappropriate to pay you any of the monies that might be owed you for vacation/random days until this Unfair Labor Practice charge is resolved by the National Labor Relations Board. Medallion Kitchen, Inc. will contact you, and forward any monies you might be entitled to as soon as the Unfair Labor Practice Charge is resolved.

Furthermore, the record indicates that Respondent had made exceptions to its policy, albeit through inadvertence, on at least three occasions. In the meantime, approximately 130 former strikers are awaiting payment for their accrued vacation and random day benefits. While the Company repeatedly emphasized that its policy was not meant to be discriminatory towards the strikers, and even considering that the Respondent may have anticipated some hardship in making these payments all at one time or during a time when it needed to keep the complement of its employees working, the effect of its policy is discriminatory. Respondent could have made a good faith effort and established a schedule whereby it could make these payments over a certain period of time. However, entirely refusing to meet its obligations towards the strikers, lest they either terminate their right to reinstatement or be employed by the Respondent while at the same time denying them employment status, effectively deprives them of the benefits which they would have received had it not been for the strike. I find therefore that the Respondent violated Section 8(a)(3) and (1) of the Act. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

Independent Violations of Section 8(a)(1) of the Act

According to the complaint, Respondent made several threats to employees because of their strike activity and promised them pay raises in order to discourage their support for the Union. In this regard the record shows as follows: Richard Rone, Respondent's vice-president had a conversation with several strikers while they were on the picket line. During that conversation Rone stated to em-

ployees Michael Hooker and Nola Halverson that the Company was losing business because of the strike and that a layoff could result.

During a telephone conversation on November 1, 1983 Tom Cappola, Respondent's former plant manager, told employees Brian and Janet Wehrenberg that he had no intentions of signing a contract with the Union once he had replaced the positions with strike replacements. During that conversation Cappola urged Brian Wehrenberg to return to work. Respondent disputes Cappola's statements suggesting that such testimony is illogical. However, considering that Cappola failed to deny Wehrenberg's testimony, it stands uncontroverted.

Bruce Roeder, a former foreman in Respondent's door building department, told employee Tony Arechigo during a conversation about one week and a half before the Union's vote to strike that "you guys go on strike, the Union is not coming back." During a similar conversation which dealt with the advantages and disadvantages of a union, Roeder told Arechigo "that, if the Union wasn't there, he could personally give us — give me a raise if I worked up to his standards. And now in this way, with the Union there, he'd have to go through the channels to get a raise."

Roeder made the same statements to employee Randi Austin. While walking with her to a cafeteria and explaining a new job to this employee, Roeder stated that if she did well, and "if there wasn't a Union in there, he could give me a raise." He asked her if she would join the strike and said that if the employees "went out on strike, that the Union wouldn't come back as a union."

Employee Esmer Gillaspey recalled Roeder telling her that if the employees went out on strike, there would not be a Union and that the employees would not have a job.

The consistent testimony of these employees — which I have credited — was only disputed by another employee witness who testified that she had never heard Roeder make such statements. She conceded, however, that he could have made these statements without her knowledge.

Only some of the above statements made by Respondent's supervisors to the employees were sufficiently coercive and threatening so as to interfere with their Section 7 rights. Roeder's remarks telling the employees that the Union would not come back if the employees went out on strike, was made to several employees, about one week before the strike vote by the Union, at the Company's premises and in an environment of coercion during which the employees were initially interrogated as to whether they favored a strike or not. These statements were clearly intended to dissuade the employees from their support for the Union and the strike. This conduct violated Section 8(a)(1) of the Act. His other remarks to the effect that he could give the employees pay raises if it were not for the Union was vague and further qualified with the condition that the employee perform well. Under these circumstances, Respondent did not condition a promise of benefits in exchange for the employee's refusal to support the Union. Moreover, the statements made by supervisors Cappola and Rone were not sufficiently clear and, in any case, were not made with the intent to coerce or restrain the individuals. I find therefore that Respondent violated Section 8(a)(1) of the Act only in connection with Roeder's repeated threats to the employees as detailed above.

Conclusions of Law

1. Medallion Kitchens, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local No. 127, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily failing to reinstate its employees in accordance with their seniority after they had made an unconditional offer to work following a strike, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By discriminatorily refusing to pay its employees random day and vacation benefits because of their participation in a strike, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By threatening its employees because of their protected, concerted activity Respondent violated Section 8(a)(1) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to offer reinstatement to the replaced strikers, after their unconditional offer to return to work, in accordance with their seniority

as vacancies arose following a fire at the plant, it must offer them reinstatement as the vacancies arose and will arise in the future and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of its failure of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977) and discharging, if necessary all the replacement employees who had been hired as temporary workers.

Having further found that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily failing to pay the strikers their random day and vacation pay, it must make them whole and pay them their earned benefits with interest as prescribed in the above cases, irrespective of whether the strikers have been reinstated or whether they discontinue their employment status with the Respondent.

On these findings of fact and conclusions of law and on the entire record I issue the following recommended[2]

ORDER

The Respondent Medallion Kitchens, Inc. of Fergus Falls, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to reinstate its employees in accordance with their seniority or otherwise discriminate against them after

[2]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

they had made an unconditional offer to return to work following a strike.

(b) Failing to pay its employees their accrued vacation and random day benefits because of their participation in a strike.

(c) Threatening its employees because of their protected concerted activity.

(d) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer its employees immediate and full reinstatement to their former jobs, or to substantially equivalent positions, in accordance with their seniority, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, discharging if necessary the temporary replacement employees, in the manner set forth in the remedy section of this decision.

(b) Offer its employees payment of their accrued vacation and random day benefits irrespective of whether they had participated in a strike, or whether they are in active employment status or whether they had terminated their employment.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records neces-

say to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Fergus Falls, Minnesota, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. December 26, 1984

/s/Karl H. Buschmann
Karl H. Buschmann
Administrative Law Judge

---

[3]If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
JUDGMENT
No. 85-1548

Medallion Kitchens,

Petitioner,

v.

National Labor Relations Board,

Respondent.

International Union, UAW, Local No. 1267,

Intervenor.

Petition for Review of an Order of the National Labor Relations Board

---

This petition for review of an order of the National Labor Relations Board was submitted on the administrative record, briefs of the parties and was argued by counsel.

After consideration it is ordered and adjudged that the order of the National Labor Relations Board is affirmed in accordance with the opinion of this Court.

November 26, 1986.

FORM NLRB-4783
(12-70)

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS

ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to reinstate employees who had been on strike or otherwise discriminate against any of our employees because of their support of UNITED AUTOMOBILE WORKERS, LOCAL NO. 1267, or any other union.

WE WILL NOT refuse to pay vacation or random day benefits to our employees because they participated in a strike.

WE WILL NOT threaten our employees because of their exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer our employees who participated in the strike full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits, with interest, discharging if necessary the temporary replacement employees.

WE WILL pay our employees for their accrued vacation and random day benefits irrespective of whether they had participated in the strike, with interest.

MEDALLION KITCHENS, INC.

(Employer)

Dated ---------- By ----------
(Representative) (Title)

BEST AVAILABLE COPY

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office,

National Labor Relations Board, Region 18
316 Federal Building, 110 S. Fourth St.
Minneapolis, Minnesota 55401
Area Code 612-725-2611

No. 86-1327

FILED
APR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

MEDALLION KITCHENS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board properly concluded that economic strikers who have made an unconditional offer to return to work must be reinstated in preference to temporary strike replacements who are in layoff status at the time the unconditional offer is made.

2. Whether, in the circumstances of this case, petitioner had fair notice of the General Counsel's theory of unfair labor practice liability and was afforded a full opportunity to develop its affirmative defense to that theory.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1327

MEDALLION KITCHENS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 806 F.2d 185. The decision and order of the National Labor Relations Board (Pet. App. A14-A26), including the decision of the administrative law judge (Pet. App. A26-A45), are reported at 275 N.L.R.B. 58.

JURISDICTION

The judgment of the court of appeals (Pet. App. A46) was entered on November 26, 1986. The petition for a writ of certiorari was filed on January 17, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Medallion Kitchens, Inc., is a Minnesota corporation located in Fergus Falls, Minnesota, where it is engaged in the manufacture and non-retail sale and

distribution of kitchen and bathroom cabinets. In 1983, petitioner's 279 plant production and maintenance employees were represented by Local 1267 of the United Automobile Workers Union. A collective bargaining agreement between petitioner and the Union expired on September 19, 1983. No new agreement was reached, and almost all of the bargaining unit employees went out on strike. Petitioner continued to operate with a full complement of approximately 250 employees, consisting of the few employees who never went on strike and others who went on strike but returned shortly thereafter (collectively referred to as "non-strikers"), plus strike replacements hired after the strike began. The replacements were told that a strike was in progress and that their employment would last only for the duration of the strike. Pet. App. A2-A3, A27-A32.

On December 10, 1983, a fire destroyed the plant's main building. Production ceased, and all but about 20 to 30 employees were laid off.[1] Through telephone calls, at a meeting at the plant on December 15, and at a Christmas party on December 17, petitioner assured the idled employees that it was making every effort to reopen the plant and to put everyone back to work as soon as possible. The employees were asked to leave their current phone numbers with petitioner, and to be ready to return to work when contacted. Pet. App. A3, A28, A31.

On December 19, the union, on behalf of all strikers, made an unconditional offer to return to work on December 26, and the following day almost all of the strikers made individual requests for reinstatement. Beginning in early January, and thereafter as production resumed, petitioner recalled laid-off non-strikers and replacements, but it did not reinstate any former strikers. Pet. App. A4, A28-A29.

---

[1]Some of the employees who continued to work after the fire were non-strikers; others were strike replacements (Tr. 41, 42).

2. a. The Board issued a complaint alleging that petitioner had violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by failing to reinstate the striking employees.[2] In his opening statement at a hearing before an administrative law judge (ALJ), petitioner's counsel indicated that petitioner would rely on the rule, adopted in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), that an employer is entitled to hire and retain permanent replacements for economic strikers (Pet. App. A30-A31). The General Counsel did not dispute that general proposition, but the General Counsel's first witness was petitioner's personnel director, Richard McGrady, who testified that the strike replacements had been hired on a temporary basis—in his words, "until the strike was over"—and that the replacements had been expressly so informed (*id.* at A34-A35).[3] Petitioner's

---

[2]The pertinent portions of the complaint are reprinted in the court of appeals' opinion at Pet. App. A5.

[3]Under questioning by the General Counsel, petitioner's personnel director testified as follows (Pet. App. A31-A32):

Q. When you first began interviewing replacement employees, did you interview most of those people?

A. Yes sir.

Q. Do you recall hiring Marty Beckman?

A. I remember Marty Beckman. I believe he was hired at the Holiday Inn, but I'm not sure.

* * * * *

Q. Did you tell Mr. Beckman how long he would be working?

A. No, sir. At that time we didn't know. I told him it might be a week, it might be less and it might be more.

Q. Is that essentially what you told everybody who got hired?

A. Yes, Sir.

Q. That it might be a week, it might be less, it might be a little more?

counsel did not object to the questions or to the testimony (*id.* at A35).[4]

b. In its post-hearing brief to the ALJ, petitioner argued that by mid-November the strike replacements had become permanent employees, that they had been so advised by McGrady before and after the fire, and that, as permanent employees, they were entitled to be recalled after the fire ahead of strikers seeking reinstatement (Pet. App. A33). The General Counsel argued that the strike replacements were only temporary employees who had no right to be recalled ahead of unreinstated strikers.[5] Petitioner moved to strike the General Counsel's brief to the extent that it relied on evidence showing that the replacement employees had been hired on a temporary basis, on the ground that petitioner had been misled into assuming that the permanent status of the replacements was not in issue (*id.* at A33). In the alternative, petitioner moved to reopen the hearing to present additional evidence on this matter (*id.* at A33-A34).

A. They could work up until the strike was over.

Q. Until the strike was over?

A. Or the people come back.

[4]When McGrady was later recalled as petitioner's witness, he testified as to post-fire assurances to idled employees that the plant would be reopened (Pet. App. A11, A33). His earlier testimony that replacements had been hired only for the duration of the strike, however, was "essentially uncontroverted" (*id.* at A11).

[5]In the alternative, the General Counsel argued that the replacements, even if permanent employees, could not be recalled before more senior former strikers, because the replacements had been displaced for some weeks as the result of the fire. See *Giddings & Lewis*, 255 N.L.R.B. 742 (1981), enforcement denied, 675 F.2d 926 (7th Cir. 1982). The ALJ did not pass on this alternative contention, and the Board also found it unnecessary to do so (Pet. App. A15 n.2).

The ALJ denied petitioner's motion (Pet. App. A34-A36). The ALJ found that the opening statement and the arguments advanced by petitioner's counsel showed that petitioner knew that permanence was an essential element of its defense (*id.* at A34-A35). In addition, the ALJ found that the General Counsel's questioning of petitioner's personnel director had placed the question of permanence in issue (*id.* at A35). The ALJ concluded that the evidence as to the status of the strike replacements was "certainly relevant, was not improperly received in this case, * * * did not raise a new issue, * * * did not give rise to a new issue of newly discovered evidence, and * * * certainly was not a surprise to [petitioner]" (*id.* at A36).

The ALJ ruled that the employment of permanent replacements is an affirmative defense to a charge of an unlawful failure to reinstate economic strikers and that the burden of proving this justification rests on the employer (Pet. App. A36). Relying on the record evidence, the ALJ found that petitioner had failed to carry its burden of proof on this defense, which was the only justification petitioner asserted for its failure to reinstate the former strikers (*id.* at A36-A37).[6]

3. The Board adopted the findings and conclusions of the ALJ (Pet. App. A15).[7]

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[6]The ALJ found that the strike replacements had been hired as temporary replacements. The ALJ also found no evidence that the replacements were ever told that they had become permanent employees. Pet. App. A33.

[7]The Board did not address the argument in the petition, which petitioner did not make to the ALJ, that, absent evidence of an anti-union animus, commitments to strike replacements that fall short of offers of permanent employment may nevertheless constitute a sufficient business justification for preferring replacements to strikers. See Pet. App. A14-A24.

4. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A1-A14). The court rejected petitioner's argument that it was denied due process because it had not been notified that the permanent status of the replacement employees was in issue (*id.* at A8). The General Counsel's theory, the court explained, was that petitioner committed an unfair labor practice by refusing to recall the striking employees, and that theory did not change during the proceedings (*ibid.*). The General Counsel was not required to allege that the replacement employees were not promised permanent employment, the court held, because petitioner had the burden of proof on that affirmative defense to establish that the replacements were permanent employees (*ibid.*).

The court also upheld the Board's finding that the replacements were temporary as supported by substantial evidence (Pet. App. A8-A14). The court further rejected petitioner's contention that the ALJ did not adequately consider whether petitioner had displayed an intention to treat the replacements as permanent (*id.* at A9-A11).

ARGUMENT

The court of appeals applied well settled law to the particular facts of this case. That court's decision is correct, does not conflict with any decision of this Court or of any other court of appeals, and presents no significant legal question. Accordingly, review by this Court is not warranted.

1. Petitioner asserts (Pet. 10-15) that this case presents the question whether the permanent replacement of economic strikers is the only legitimate and substantial business justification for refusing to reinstate economic strikers. In actuality, petitioner is simply quarreling with a finding of fact.

It is well settled that an employer who unjustifiably refuses to reinstate economic strikers after the conclusion of a strike commits an unfair labor practice, since the effect of the employer's action is to discourage employees from exercising their statutory rights to organize and to strike. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). However, during a strike the employer may hire replacements, in order to obtain the necessary labor force to maintain operations, and if the replacements have been hired on a permanent basis the employer may retain them in preference to striking employees who later offer to return to work. *Ibid; NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938); *Laidlaw Corp.* v. *NLRB*, 414 F.2d 99, 105 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

The employer has the burden of proving that the replacements have in fact been hired on a permanent basis. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 378. The Board and the courts of appeals have consistently held that the hiring of strike replacements is a justification for refusing to reinstate striking employees only if the replacements were informed, at the time they were hired or before the striking employees unconditionally offered to return to work, that they have received their jobs on a permanent basis. See, *e.g., Randall, Division of Textron, Inc.* v. *NLRB*, 687 F.2d 1240, 1248 (8th Cir. 1982), cert. denied, 461 U.S. 914 (1983); *Associated Grocers*, 253 N.L.R.B. 31, 32 (1980), enforced *sub nom. Transport & Local Delivery Drivers, Local 104* v. *NLRB*, 672 F.2d 897 (D.C. Cir. 1981) (Table), cert. denied, 459 U.S. 825 (1982); *NLRB* v. *Mars Sales & Equipment Co.*, 626 F.2d 567, 573 (7th Cir. 1980); *NLRB* v. *Murray Products, Inc.*, 584 F.2d 934, 939 (9th Cir. 1978).

The decision below is fully consistent with the foregoing principles. Petitioner argued before the ALJ that, before the strikers offered to return to work, the strike replacements had been informed that they would be permanent

employees, but the ALJ made a factual finding that the strike replacements were only temporary (Pet. App. A32-A37), and the Board and the court of appeals upheld the ALJ's finding. Accordingly, the Board and court of appeals determined that petitioner failed to establish a "legitimate and substantial business justification[]" for refusing to reinstate the striking employees (*NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 378 (citation omitted)). Pet. App. A8-A11, A15.

Petitioner now argues that permanent replacement is not the only "legitimate and substantial" business justification for refusing to reinstate economic strikers. Although petitioner is correct in principle,[8] that principle does not aid him in this case. The only two justifications offered by petitioner —that it made "commitments" to the temporary replacements to insure adequate staffing for the clean-up and resumption of production, and that it is entitled to honor those commitments (Pet. 14)—simply restate its claim that the replacements were guaranteed permanent employment. That claim was rejected as a factual matter by the Board and the court of appeals,[9] and it does not warrant further review. This case therefore does not present an occasion to determine what other types of business justifications are "legitimate and substantial."

2. Petitioner also contends (Pet. 15-21) that the court of appeals erred in enforcing a Board order based on a legal theory not alleged in the Board's complaint. That claim,

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[8]For example, the absence of vacancies resulting from bona fide decreases in the required work force, whether or not strike-related, is one other such justification. See *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 379 (noting that the Board had taken this position). Petitioner did not assert any such justification in this case, however.

[9]The ALJ found that petitioner's assurances did not change the temporary status of the replacements (Pet. App. A33), the Board adopted that finding (*id.* at A15), and the Board's finding was upheld by the court of appeals (*id.* at A11).

which turns on the circumstances of this case, does not warrant further review. In any event, the decision below was correct.

The complaint stated the General Counsel's theory, which was that petitioner had violated the Act by recalling replacements rather than striking employees. Since hiring permanent employees is an affirmative defense on which the employer bears the burden of proof (see *NLRB* v. *International Van Lines*, 409 U.S. 48, 54 (1972) (Blackmun, J., concurring in the judgment); *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 378), the General Counsel's allegation put petitioner on notice that it was obligated to prove that the replacements were permanent. Due process does not require more. A court is not barred from enforcing a finding by the Board of an unfair labor practice so long as the respondent was aware of the charge during the hearing and had a full and fair opportunity to litigate the matter. See, *e.g.*, *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. at 349-350; *NLRB* v. *International Association of Bridge Workers Local 433*, 600 F.2d 770, 775 (9th Cir. 1979), cert. denied, 445 U.S. 915 (1980); *NLRB* v. *Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977).

Moreover, regardless of what petitioner's attorney may have assumed from the complaint, the testimony of the General Counsel's first witness (who was petitioner's personnel director) showed that the status of the replacements was in issue (see page 3, *supra*). Accordingly, the Board correctly found that petitioner was aware of the need to prove that the replacements were permanent and that petitioner had a full and fair opportunity to offer his proof on that issue (Pet. App. A34-A36). Petitioner's failure to do so was its own fault, not the General Counsel's.

Petitioner erroneously asserts (Pet. 17) that the decision below conflicts with decisions from other circuits. None of the decisions cited by petitioner holds that the General

Counsel must state in her complaint that the employees hired to replace economic strikers were temporary and not permanent. The only decision cited by petitioner similar to this case is *Presto Casting Co.* v. *NLRB*, 708 F.2d 495 (9th Cir.), cert. denied, 464 U.S. 994 (1983), but that case is factually distinguishable. There, the court refused to enforce the Board's order insofar as it held that the employer unlawfully refused to reinstate employees who had engaged in an economic strike. The court explained that, on the facts of that case, the employer did not have an opportunity to litigate the permanence issue fairly. *Id.* at 498. By contrast, in this case the court of appeals concluded that petitioner was aware of this issue and had a full and fair opportunity to litigate it. The remaining cases cited by petitioner hold only that a complaint must sufficiently inform the respondent of the alleged violation of the Act to enable the respondent to mount a defense.[10] The court below agreed with that

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[10]See *Conair Corp.* v. *NLRB*, 721 F.2d 1355, 1371-1373 (D.C. Cir. 1983) (a complaint alleging that an employer violated the Act by threatening to discharge employees could not support a finding that the employer violated the Act by actually discharging employees), cert. denied, 467 U.S. 1241 (1984); *NLRB* v. *Pepsi-Cola Bottling Co.*, 613 F.2d 267, 272-274 (10th Cir. 1980) (a charge of failing to reinstate unfair labor practice strikers cannot support a finding of discrimination in hiring on the basis of union activity, because an employer's intent is irrelevant with respect to a charged failure to reinstate unfair labor practice strikers, while anti-union motivation is an essential element of discriminatory refusal to hire); *Boyle's Famous Corned Beef Co.* v. *NLRB*, 400 F.2d 154, 161-165 (8th Cir. 1967) (a complaint alleging that an employer had assisted in the formation of a new union and dominated the new union could not serve as the basis for a finding that the employer unlawfully refused to bargain collectively with the union previously recognized as the bargaining representative).

The remaining court of appeals decisions cited by petitioner are wholly inapposite. *NLRB* v. *Sunnyland Packing Co., supra*, upheld the Board's finding on an unpled charge that the employer had applied a "no solicitation" rule in a discriminatory manner, because the court found that the employer had adequate notice of the allegation and a fair opportunity to litigate it. 557 F.2d at 1161-1162. Finally, *Clear Pine*

proposition (Pet. App. A6), and its application of that rule to the particular facts of this case does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1987

Mouldings, Inc. v. *NLRB*, 632 F.2d 721, 728 (9th Cir. 1980), cert. denied, 451 U.S. 984 (1981), upheld an ALJ's decision to allow amendment of the complaint and to provide the respondent with six weeks of preparation time to meet a new allegation. The court did not rule, as petitioner suggests (Pet. 17), that an amendment and continuance are always necessary in such circumstances.

Supreme Court, U.S.
FILED
APR 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1327

In The

Supreme Court of the United States

October Term, 1986

MEDALLION KITCHENS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (UAW) and its LOCAL 1267,

Intervenor-Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

INTERVENOR-RESPONDENT UAW'S BRIEF IN OPPOSITION

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No. 86-1327

In The

Supreme Court of the United States

October Term, 1986

MEDALLION KITCHENS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, et al.,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

INTERVENOR-RESPONDENT UAW'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF FACTS

On September 19, 1983, the members of the United Auto Workers Local 1267 began a lawful economic strike against their employer, Medallion Kitchens. Medallion immediately hired a number of replacement employees, explicitly informing each that he or she "would work up until the strike was over." (App. A-3)

On December 10, 1983, while the strike was still in progress and the replacement employees were still working, a large portion of Medallion's facility was destroyed by fire. Medallion then made efforts to contact the replacement employees and inform them of Medallion's plans to

resume production as soon as the fire damage could be repaired. No evidence was presented that these communications involved any issues related to the strike or to the replacement employees' likelihood of retaining their positions after the strike ended.

On December 19, 1983, the Union notified the employer that the strike was at an end and the employees would be unconditionally available to return to work effective December 26. Medallion did not allow the former strikers to return to work but instead continued to fill available positions with the strike replacements.[1]

The Union then filed unfair labor practice charges with the National Labor Relations Board (NLRB). The Union alleged that Medallion's conduct in refusing to offer reinstatement to former strikers unconditionally offering to return to work — and in continuing to call back strike replacements to fill available positions — violated Section 8(a)(3) of the National Labor Relations Act (NLRA). The Administrative Law Judge (ALJ), the NLRB, and the Eighth Circuit all agreed that the strike replacements had not been promised that their employment would continue beyond termination of the strike and that Medallion did not have any other "substantial and legitimate business reason" for refusing to reinstate the former strikers following their unconditional offer to return to work.

The ALJ, the NLRB, and the Eighth Circuit all therefore agreed that Medallion's refusal to recall the former strikers — and continuing preference for the strike replacements — constituted an unfair labor practice prohibited by Section 8(a)(3) of the NLRA.

---

[1] By the time of the hearing before the Administrative Law Judge, 114 strike replacements had been called back to work; no former striker had been offered the opportunity to return.

REASONS FOR DENYING THE WRIT

This case presents nothing requiring review by this Court. The legal doctrine involved — that economic strikers retain their status as "employees" and therefore their right to be recalled to fill available positions if they abandon their strike and unconditionally offer to return to work — is almost as old as the National Labor Relations Act itself and has already been fully reviewed and codified by this Court. Moreover, there is no conflict of lower court authority on this topic, as Medallion concedes. Finally, as the Eighth Circuit properly found, the Board here correctly applied this well-settled doctrine to the facts of this case. (Part A, *infra*)

Nor need this Court review Petitioner's claim that it was deprived of its due process rights because the Board's General Counsel "switched theories" by putting in issue the "temporary" or "permanent" status of the strike replacements. As the Eighth Circuit properly noted, and as Medallion itself concedes, the hiring of permanent replacements is one of the well-settled affirmative defenses to an unfair labor practice charge based on a refusal to reinstate economic strikers unconditionally offering to return to work. It was, therefore, Medallion's burden to introduce evidence that the strike replacements were "permanent" rather than "temporary" if it wished to defend its conduct on that basis. (Part B, *infra*)

A. Barely three years after passage of the National Labor Relations Act by Congress, this Court decided the landmark case of *NLRB* v. *Mackay Radio*, 304 U.S. 333 (1938). This Court held in that case that economic strikers retain their status as "employees" — and therefore their right to be recalled upon making an unconditional offer to return to work — despite their

engaging in a strike activity.[2] The *Mackay* Court also created an exception to this rule: if an employer has, during the strike, hired permanent replacements for the striking employees, those permanent replacements need not be displaced to make room for returning strikers. 304 U.S. at 345-346.

The *Mackay* doctrine was reaffirmed and further codified by this Court in *NLRB* v. *Fleetwood Trailer*, 389 U.S. 375 (1967). The Court in *Fleetwood* reiterated that "unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice." 389 U.S. at 378 [quoting *NLRB* v. *Great Dane Trailers*, 388 U.S. 26, 34 (1967)]. Citing *Mackay*, the *Fleetwood* Court also noted that one such justification will be "when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike." 389 U.S. at 379. Finally, the *Fleetwood* Court clarified that the employer bears the "burden of establishing 'that it was motivated by legitimate objectives'" when it refuses to reinstate strikers abandoning their strike and unconditionally offering to return to work. 389 U.S. at 380 [quoting *NLRB* v. *Great Dane Trailers*, 388 U.S. 26, 34 (1967)]. See also *NLRB* v. *International Van Lines*, 409 U.S. 48 (1972).

As the Eighth Circuit found, the Board here properly applied these well-settled doctrines to the particular facts of this case. Thus, the Administrative Law Judge, as affirmed by the NLRB, found that Medallion had refused to reinstate former strikers making an un-

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[2] The Act itself requires this conclusion. The statutory definition of "employee" explicitly includes individuals "whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . and who [have] not obtained any other regular and substantially equivalent employment." NLRA § 2(3), 29 U.S.C. § 152(3).

conditional offer to return to work, and that Medallion had failed to "meet [its] burden of justifying its failure to reinstate the strikers." (App. A-37)

The ALJ and the Board fully considered each affirmative defense raised by Medallion, and rejected each. Based on uncontroverted record evidence, the Administrative Law Judge, and the Board, found that the strike replacements hired by Medallion were not "permanent replacements" and therefore their presence did not justify Medallion's failure to reinstate the strikers.[3] Moreover, the Board and the Administrative Law Judge properly found that the interruption of Medallion's production by the fire did not, in itself, justify Medallion's continuing preference for strike replacements over strikers when it began calling employees back to work as the fire damage was repaired. Finally, based on a review of all the evidence adduced at trial, the Administrative Law Judge determined that Medallion's post-fire communications to strike replacements — on which Medallion places great weight — did not justify Medallion's refusal to recall the former strikers.[4]

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[3] Medallion's personnel director, for example, testified that he informed each strike replacement that he or she "would work up until the strike was over." (App. A-32; A-11)

[4] As the Administrative Law Judge stated, Medallion representatives communicated to replacement employees shortly after the fire "that [Medallion] would make an effort to get the Company operating as soon as possible and expected the employees to be back to work." (App. A-33) As found by the Administrative Law Judge, however, the record evidence did not demonstrate that the replacements "were ever informed" that their employment would survive termination of the strike. *Id.* The Administrative Law Judge therefore concluded that Medallion's post-fire communications with strike replacements were insufficient to "change[ ] [their status] to one of permanence." *Id.*

Medallion claims that the Eighth Circuit erred in assuming that retention of permanent replacements is the "only" basis on which to justify a refusal to reinstate former strikers. This argument is misplaced for two reasons.

First, none of the tribunals below failed to consider any of Medallion's asserted justifications. Instead, the Administrative Law Judge, the Board, and the Eighth Circuit, however, examined *each* of Medallion's proferred justifications and concluded that Medallion had failed to carry its burden on any ground. (See, e.g., App. A-8; A-11)

Second, all of the justifications offered by Medallion *did* involve the presence of the replacement employees and various communications to them. Medallion did not argue that any result of the fire — other than the post-fire communications to replacements — formed a basis for Medallion's refusal to recall the former strikers. Medallion did not argue, for example, that the former strikers' skills had become obsolete due to changes in the method of production. Nor did Medallion make any other argument unrelated to the replacements. This case, therefore, does not present any issue involving justifications for refusal to recall former strikers other than those — fully considered below — related to the retention of replacement employees.

It is well settled that "[i]t is the primary responsibility of the Board and not the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" *Fleetwood Trailer*, 389 U.S. at 378 [quoting *Great Dane Trailers, supra*, 388 U.S. at 33-34]. Moreover, this Court has concluded that the factual determinations of the National Labor Relations Board are to be upheld whenever "supported by substantial evidence on the

record considered as a whole." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951).

The Board here considered each of Medallion's purported justifications for refusing to recall the former strikers — the hiring of replacements, the fire, and the post-fire communications with the replacements. And the Board was well within the range of its discretion — and amply supported by record evidence — in concluding that none of those proffered justifications excused Medallion's continued refusal to offer available positions to the former strikers. Given that, and given the lack of conflict of lower court opinion on *any* of the issues presented here, there is no need for this Court to review the decision of the Eighth Circuit here.

B. Medallion argues here — as it did below — that the Board's General Counsel "switched . . . theories" by putting in issue the temporary or permanent status of the strike replacements. As the Eighth Circuit properly held, however, no such "switch" occurred. The Complaint alleged that Medallion "had failed and refused, and is continuing to fail and refuse, to recall any of the strikers" in violation of Section 8(a)(3) of the NLRA. (App. A-5) The ultimate theory of liability as found by the ALJ and affirmed by the Board and the Eighth Circuit, then, was that Medallion violated Section 8(a)(3) "[b]y discriminatorily failing to reinstate its [former striker] employees in accordance with their seniority after they had made an unconditional offer to return to work." (App. A-42) It is difficult to imagine a theory of liability more consistent with the pleadings.

Medallion's claim that it was prejudiced by the Board's putting in issue the question of the "permanent" or "temporary" status of the strike replacements does not support its argument here. By the clear language of the Complaint, Medallion was put on notice that its con-

duct in refusing to recall former strikers was at issue. As both *Mackay* and *Fleetwood* hold, then, the *employer* is free to raise as an affirmative defense a "substantial and legitimate business justification" — such as retention of permanent replacements — to rebut the inference of discriminatory intent which arises from such conduct. Medallion here was given ample notice of the nature of the unfair labor practice charged, and ample opportunity to assert any affirmative defenses it chose. As the ALJ, the Board, and the Eighth Circuit found, however, Medallion simply failed to prevail on any of the affirmative defenses on which it sought to rely — including Medallion's argument that the replacements were "permanent."

As the Eighth Circuit properly held, Medallion cannot now blame its failure to prevail on a particular affirmative defense on the failure of the Complaint to mention that potential affirmative defense. As the Eighth Circuit stated:

> "The General Counsel's theory was that Medallion recalled replacements and unlawfully refused to recall any of the strikers. This theory did not change during the proceedings. The burden was on Medallion to come forward with its own defense as to why the failure to reinstate did not amount to a violation of the Act.
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> * * *
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> [T]he permanence issue was no more conceded by the General Counsel's silence than was any other possible defense Medallion might raise." (App. A-8)

Thus, Medallion is simply incorrect in claiming that "the General Counsel pled one charge while the ALJ and the Board found liability on another.", (Pet. at 17) No such "switch" in theories occurred, and Medallion

has therefore failed to demonstrate that this aspect of the decisions below requires review by this Court.[5]

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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[5] Medallion does claim at one point that there is some conflict between two *other* circuit court decisions regarding the General Counsel's duty to amend pleadings when a switch in theories does in fact occur. (Pet. at 17) The cases that Medallion asserts are in conflict hold, respectively, that the "Board may either render a decision upon the issues *actually tried or* order an amendment to conform with the proof," *Clear Pine Moldings* v. *NLRB*, 632 F.2d 721, 728 (9th Cir. 1980), *cert. den.* 451 U.S. 984 (1981), and that a Circuit Court should enforce "a finding not based on the complaint, but *litigated* at the hearing," *NLRB* v. *Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977) [Emphasis supplied in both quotations]. The conflict asserted by Medallion is therefore more imagined than real. More importantly, even *if* the above holdings were deemed to conflict with each other, the present case does not create the vehicle to resolve such a conflict for the simple reason, as shown above, that *no switch* in theories occurred here. The technical question whether pleadings must be conformed to reflect issues "actually tried" or "litigated" is thus not presented here because the pleadings, as originally drafted, already conformed with the issue actually tried.